Supreme Court, U.S.
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No. 98-

In the Supreme Court of the United States

OCTOBER TERM, 1998

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

KOLOSSO AUTO SALES, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Seventh Circuit err in holding — despite this Court's requirement that any impairment of a contract by a state "must be * * * for an end which is in fact public," *Triegle* v. *Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) — that a state may freely impair a contract with *no* public justification, so long as the impairment is "small."

2. Is state legislation impairing a contract "foreseeable," and therefore not a "substantial" impairment, in the absence of *any* prior retroactive legislation in the field and in the face of prior opinions of the Eighth Circuit and other courts striking down similar impairments under the Contract Clause.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner DaimlerChrysler Corporation, formerly Chrysler Corporation, states that it has one parent company, DaimlerChrysler AG, a publicly traded German stock corporation. DaimlerChrysler Corporation has nonwholly owned subsidiaries, which are set forth in App. F, *infra*.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
A. Wisconsin's Impairment of Chrysler's Franchise Agreement	3
B. Kolosso's Relocation Request	5
C. The District Court Action	6
D. The Seventh Circuit's Decision	7
REASONS FOR GRANTING THE PETITION	9
A. The Seventh Circuit's Decision Conflicts with This Court's Precedents Requiring a State to Provide a Police Power Justification for Impairing a Contract	11
B. The Decision Below Creates a Split in the Circuits Over When Contractual Impairments are Foreseeable	15
C. The Issues Presented Here Require a Uniform National Interpretation	18
CONCLUSION	21

TABLE OF AUTHORITIES

Page(s)

Cases:

Adams v. *Storey*, 1 F.Cas. 141 (C.C.D.N.Y. 1817) 13

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 10, 12

Anderson's Vehicle Sales, Inc. v. *OMC-Lincoln*, 287 N.W.2d 247 (Mich. Ct. App. 1980) 19

Baltimore Teachers Union v. *Mayor & City Council of Baltimore*, 6 F.3d 1012 (4th Cir. 1993) 15-16

City of El Paso v. *Simmons*, 379 U.S. 497 (1965) 10-11, 15

Energy Reserves Group, Inc. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) . . . . . *passim*

Fireside Chrysler-Plymouth Mazda, Inc. v. *Chrysler Corp.*, 472 N.E.2d 861 (Ill. App. Ct. 1984) 17

General Motors Corp. v. *Romein*, 503 U.S. 181 (1992) 10, 15

Globe Liquor Co. v. *Four Roses Distillers Co.*, 281 A.2d 19 (Del. 1971) 18

Holiday Inns Franchising v. *Branstad*, 29 F.3d 383 (8th Cir. 1994) 1, 9, 16-18

Home Bldg. & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934) 11, 13

TABLE OF AUTHORITIES — Continued

Page(s)

Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1986) 11, 13

Manigault v. *Springs*, 199 U.S. 473 (1905) 11

Mercado-Boneta v. *Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9 (1st Cir. 1997) 16

Nieves v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir. 1987) 16

Northshore Cycles, Inc. v. *Yamaha Motor Corp.*, 919 F.2d 1041 (5th Cir. 1990) 17

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 13

Queen City Pizza, Inc. v. *Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997) 18

Ruiz v. *Economics Lab., Inc.*, 274 F.Supp. 14 (D.P.R. 1967) 19

Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997) 16

Scuncio Motors, Inc. v. *Subaru*, 555 F. Supp. 1121 (D.R.I. 1982), aff'd, 715 F.2d 10 (1st Cir. 1983) 1, 14, 17

Superior Motors, Inc. v. *Winnebago Indus, Inc.*, 359 F.Supp. 773 (D.S.C. 1973) 18

Toledo Area AFL-CIO Council v. *Pizza*, 154 F.3d 307 (6th Cir. 1998) 16

TABLE OF AUTHORITIES — Continued

Page(s)

Triegle v. *Acme Homestead Ass'n*, 297 U.S. 189 (1936) 10, 12

United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) 19

United States Brewers' Association, Inc. v. *State of Nebraska*, 220 N.W.2d 544 (Neb. 1974) 18

United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 12, 15

Viex v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940) 12

Ward v. *Chevron U.S.A., Inc.*, 598 P.2d 1027 (Ct. App. Ariz. 1979) 18

Willys Motors, Inc. v. *Northwest Kaiser-Willys, Inc.*, 142 F.Supp. 469 (D.Minn. 1956) 19

Wipperfurth v. *U-Haul Co.*, 304 N.W.2d 767 (Wis. 1981) 3, 6, 9, 17

Yamaha Parts Distr. Inc. v. *Ehrman*, 316 So.2d 557 (Fla. 1975) 18

Constitutional Provision and Statutes:

U.S. Const. art. I, § 10 . . . . . 2, 7, 11

28 U.S.C. § 1254(1) 2

Wis. Stat. Ann. § 218.01(3x) . . . . . *passim*

Wis. Stat. Ann. § 218.01(3x)(b)(2) 4

Wis. Stat. Ann. § 218.01(3x)(b)(3) 4

Wis. Stat. Ann. § 218.01(3x)(c)(2) 5

TABLE OF AUTHORITIES — Continued

Page(s)

Other Authorities:

Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 89 YALE L.J. 1552 (1977) 20

James Madison, THE FEDERALIST NO. 44 (1961) 14

PETITION FOR A WRIT OF CERTIORARI

The accepted wisdom in real estate and retail business is that location is critical to success. In recognition of this basic principle, petitioner DaimlerChrysler Corporation ("Chrysler") has a provision in its standard franchise agreement with each of its dealers nationwide that bars a dealer from changing its location without DaimlerChrysler's approval.[1]

This case presents the fundamental question whether a state can impair such an important provision of a contract with *no* public justification for its action. The Seventh Circuit held, contrary to longstanding precedents of this Court, that Wisconsin could apply a statute retroactively to restrict DaimlerChrysler's contractual right to bar a dealer's relocation with no *public* (rather than private) benefit to support the legislation.

Moreover, the court of appeals created a circuit split when it held that such an impairment of a vital contract term was "foreseeable," and therefore not "substantial," despite the fact that (a) the State of Wisconsin had never regulated the location of automobile dealerships and (b) the only Wisconsin statute that had ever purported to apply retroactively to franchise agreements was struck down as a violation of the Contract Clause. The Seventh Circuit's holding conflicts with numerous federal and state court decisions, including *Scuncio Motors, Inc.* v. *Subaru*, 555 F. Supp. 1121 (D.R.I. 1982), 715 F.2d 10 (1st Cir. 1983), and *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383, 385 (8th Cir. 1994), in which the Eighth Circuit held that a retroactive application of the Iowa Franchise Act was not foreseeable because previous state franchise legislation was not retroactive and the retroactive application of similar franchise statutes elsewhere had "almost

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[1] On November 17, 1998, Chrysler Corporation merged with Daimler-Benz AG to form a new company. Chrysler Corporation was renamed DaimlerChrysler Corporation, and is now a wholly owned subsidiary of DaimlerChrysler AG.

uniformly been held unconstitutional."

The Seventh Circuit has thus misapplied this Court's precedents and created a circuit conflict on important issues of constitutional law with nationwide significance. Indeed, a large number of franchisors have standard agreements with franchisees in many states. The Seventh Circuit's decision in this case unsettles expectations for all franchisors that seek to promote national uniformity in their franchise agreements.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 148 F.3d 892. The order of the district court (App. B) and the recommendation of the magistrate judge (App. C) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1998. A timely petition for rehearing was denied on September 18, 1998 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the Constitution provides in relevant part: "[n]o State shall * * * pass any * * * Law impairing the obligation of Contracts." U.S. CONST. art. I, § 10.

The pertinent provisions of the Wisconsin Dealer Act, Wis. Stat. Ann. § 218.01(3x), are reproduced in the Appendix.

STATEMENT

A. Wisconsin's Impairment of Chrysler's Franchise Agreement.

Chrysler entered into a franchise agreement in 1988 with respondent Kolosso Auto Sales, Inc. ("Kolosso"). Under the agreement, Kolosso was authorized to buy, sell, and service Jeep and Eagle motor vehicles. In recognition of Chrysler's overriding economic interest in the location of its franchise dealerships, the agreement fixed the precise location of Kolosso's dealership at a specified address in Appleton, Wisconsin. The agreement also barred Kolosso from moving from that location without Chrysler's written approval. App. 1a.

At the time that Chrysler executed its franchise agreement with Kolosso, Wisconsin had no statutes or regulations governing whether or where automobile dealers could relocate. Indeed, neither Wisconsin nor any other state had ever regulated this important and substantial aspect of the franchisor-franchisee relationship.

In 1993, however, five years after Chrysler had executed its franchise agreement with Kolosso, the Wisconsin legislature amended its automobile dealership statute, the Wisconsin Dealer Act ("Dealer Act"), to address the issue of dealership relocation. The legislature added a provision (Section 218.01(3x) (App. 45a-48a.)) to the statute that allows an automobile dealer to relocate over a manufacturer's objection, if the dealer can demonstrate "good cause" for the move before an administrative agency.

The 1993 amendment to the Dealer Act purported to apply retroactively to existing franchise agreements. This was the Wisconsin legislature's first attempt to apply a statute retroactively to franchise contracts since 1981, when its only other attempt was struck down as a violation of the Contract Clause by the Wisconsin Supreme Court. *Wipperfurth* v. *U-*

Haul Co., 304 N.W.2d 767 (Wis. 1981).

Under the 1993 relocation amendment, a dealer must still seek the manufacturer's consent to relocate — if such consent is required by the governing franchise agreement. If the manufacturer chooses not to grant permission, however, it must provide the Wisconsin Division of Hearings and Appeals ("the Division of Hearings") with a written statement explaining its reasons for denying the dealer's request.[2] Any failure to file the statement "shall, notwithstanding the terms of any agreement, constitute approval of the proposed action by the grantor." Wis. Stat. Ann. 218.01(3x)(b)(2) (1997).

After receiving the manufacturer's written statement explaining its denial of a relocation request, the Division of Hearings must determine whether there is "good cause" for granting the relocation request. If the Division of Hearings finds "good cause," the dealer may relocate, despite the manufacturer's objection. In making its "good cause" determination, the administrative agency is not limited to considering — indeed, is not even required to consider — the economic reasonableness of the manufacturer's business decision, but instead may consider *any* relevant factor, including:

a. the reasons for the proposed action;

b. the affected grantor's reasons for not approving the proposed action;

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[2] The Dealer Act originally authorized the Wisconsin Commissioner of Transportation to review relocation requests, but that agency has since been abolished. The Wisconsin legislature has authorized the Division of Hearings to perform this function. See Wis. Stat. Ann. § 218.01(3x)(b)(3).

c. the degree to which the inability to undertake the proposed action will have a substantial and adverse effect upon the motor vehicle dealer's investment or return on investment;

d. whether the proposed action is in the public interest;

e. the degree to which the proposed action will interfere with the orderly and profitable distribution of products affected by the grantor; and

f. the impact of the proposed action on other motor vehicle dealers.

Wis. Stat. Ann. § 218.01(3x)(c)(2).

B. Kolosso's Relocation Request.

Kolosso requested permission from Chrysler in 1995 to relocate its dealership "to another address in Appleton in order to enable it to consolidate the service facilities of its Chrysler dealership with the service facilities of a Toyota dealership that it owned at that address." App. 2a.

Chrysler denied Kolosso's request, because Kolosso's original location was extremely advantageous for the sale of Jeep and Eagle vehicles. The Kolosso dealership was near the primary competition for Jeep and Eagle sport utility vehicles, and relocation would lessen those brands' competitive standing in Appleton. App. 27a. In addition, Kolosso sought to lease its current desirable location in "auto row" to a dealer that sold *used* Jeep and Eagle vehicles, which would dilute the Jeep and Eagle market. *Ibid.*

After receiving Chrysler's denial, Kolosso invoked Wisconsin's amended Dealer Act and filed a complaint with the Division of Hearings requesting permission to relocate. App. 2a.

C. The District Court Action.

In response, Chrysler brought an action for declaratory and injunctive relief in the United States District Court for the Eastern District of Wisconsin. Chrysler contended that retroactive application of Section 218.01(3x) to its preexisting contract with Kolosso violated the Contract Clause of the United States Constitution.

The case was referred to a magistrate-judge, who recommended that the district court abstain in deference to the pending administrative proceeding, which was stayed pending the resolution of the federal action. App. 21a n.2; 40a. Chrysler objected to this recommendation and the district court refused to abstain. *Id.* at 13a-15a.

Instead, the court proceeded to rule against Chrysler on the merits. App. 12a-19a. Chrysler maintained that the 1993 relocation amendment violated the Contract Clause because Chrysler had a reasonable contractual expectation that it would be able to decide unilaterally whether to grant or deny any relocation request by Kolosso — an expectation that was impaired by Section 218.01(3x). Chrysler argued that it could not have anticipated Wisconsin's retroactive regulation of this substantial aspect of its franchise agreement, in light of the fact that the State had never regulated this subject before and that the State Supreme Court in *Wipperfurth* had struck down Wisconsin's only previous attempt to apply a statute retroactively to franchise agreements.

The retroactive amendment of the Dealer Act was also constitutionally defective, Chrysler argued, because it could not be justified as serving a public purpose. Instead, the modification of a manufacturer's contracted-for right to refuse a dealer's requested relocation was created to serve a small special interest group.

The district court rejected Chrysler's arguments and granted summary judgment to Kolosso. App. 19a. The court

stated that "the appropriate inquiry is whether the parties are operating in a heavily regulated industry." *Id.* at 19a n.1. Applying this standard, the court found that Wisconsin had regulated other aspects of Chrysler's franchise relationship with Kolosso and therefore Chrysler had no reasonable expectation that its right to deny a relocation request would not be abrogated by the State. On this basis, the court concluded that the retroactive application of Section 281.01(3x) did not substantially impair Chrysler's contract with Kolosso in violation of the Contract Clause. *Id.* at 18a-19a.

D. The Seventh Circuit's Decision.

Chrysler appealed, arguing that the appropriate standard was not the general inquiry "whether the parties are operating in a heavily regulated industry," but rather the more specific inquiry whether Chrysler had a reasonable expectation that it would be able to deny Kolosso's request to change its location without interference by the State. Chrysler also reiterated its argument that Section 281.01(3x) is special interest legislation, devoid of a public purpose.

The Seventh Circuit affirmed the judgment of the district court, but on narrower grounds (App. 1a-11a). The court began its analysis with the text of the Contract Clause: "No State shall * * * pass any * * * Law impairing the obligation of Contracts." U.S. CONST. art. I, § 10. The court noted that "[i]f the contracts clause of the Constitution were read literally, Chrysler would win hands down. It had a contract that obligated the dealer to stay put if Chrysler wanted him to, and the state relieved the dealer of the obligation." App. 3a.

The court was not persuaded by Kolosso's argument that the "good cause" standard applied during the administrative proceeding preserved Chrysler's contractual rights. "[A]s every employer and employee knows, there is a big difference between having a right (to terminate an employee, or in this

case to control a dealer's location) and having a right that depends on showing that there is good cause for its exercise." *Ibid.* Simply put, "[t]he state has changed the dealership contract to Chrysler's disadvantage. The result will be an added expense to Chrysler — either the loss of car sales by reason of the relocation or the expense of paying Kolosso not to move." App. 5a.

After acknowledging the impairment of Chrysler's important contractual right, the court of appeals stated that "the literal interpretation of the contracts clause has been abandoned" and so "the fact that a state makes a contract more costly to one of the parties does not establish a violation." *Ibid.* Instead, the court held that "[o]f great, and we are inclined to say controlling, importance in the determination of whether a law violates the contracts clause is the foreseeability of the law when the original contract was made." App. 5a. Accordingly, the court applied a "foreseeability" analysis and determined that, since Wisconsin had previously enacted *prospective* legislation preventing franchise *termination* except for good cause, Chrysler should have expected *retroactive* legislation preventing dealer *relocation* in the absence of good cause.

The court adopted conflicting positions on the extent of the impairment of Chrysler's contractual rights. App. 3a-10a. The court initially concluded that the impairment created a "big difference" in Chrysler's rights (*id.* at 3a) and was "a real change," which "we have no reason to doubt * * * hurt [Chrysler]." *Id.* at 9a. It later characterized the 1993 relocation amendment as a "little, predictable impairment[]" which "takes[s] only small steps along a path that was discernable." *Id.* at 10a. The court finally described the 1993 amendment as "not *really* being [an] impairment[]." *Ibid.* (emphasis in original).

The variations in the court's analysis, however, were not accompanied by any factual discussion or citation to any

findings by the district court showing that Chrysler should have foreseen that the Wisconsin legislature would abrogate the important right for which Chrysler had bargained.

In its foreseeability discussion, the Seventh Circuit did recognize that "previous changes in the [Wisconsin] dealership law had been made prospective only, with the exception of one that Wisconsin's highest court struck down under the contracts clause." *Id.* at 9a, citing *Wipperfurth,* 304 N.W.2d at 773. The court, however, failed to distinguish *Holiday Inns Franchising, Inc.* v. *Branstad*, 29 F.3d 383 (8th Cir. 1994), which found a Contract Clause violation under strikingly similar facts, including an absence of prior retroactive state franchise legislation.

The court rejected as irrelevant Chrysler's argument that the 1993 amendment to the Dealer Act was devoid of public purpose. The court instead, without citation, determined that Wisconsin's "small" impairment of Chrysler's contract "do[es]n't have to be justified at all" by a public purpose. App. 10a. It further observed that it "is fortunate for the State of Wisconsin" that such impairments "need not be justified * * *, because the justifications that its lawyers have offered for the 1993 amendment are hard to take seriously." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents substantial questions of nationwide importance concerning the scope of the Contract Clause and the validity of state laws impairing franchise and other contracts. The Seventh Circuit has adopted an expansive interpretation of the power of a state to impair a contract without public purpose and without prior warning that contractual rights might be abrogated. The court of appeals' decision conflicts with this Court's precedents and decisions by other federal and state courts, including the Eighth Circuit, that limit state authority under Contract Clause to impairments that both serve a public purpose and are reasonably

foreseeable.

This Court has laid out a clear structure for the resolution of Contract Clause issues that has, until now, served to focus the analysis of the lower courts. First, although the Contract Clause's prohibition on its face applies to all contractual impairments, this Court has held that it does not "depriv[e] the State of its prerogative of self-protection." *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 240 (1978). Thus, to avoid application of the Contract Clause, a state must demonstrate that its legislation is within the "domain of the reserve power of a State." *City of El Paso* v. *Simmons*, 379 U.S. 497, 508 (1965).

Second, even if a state satisfies this requirement, there are substantial "limits on the power of a State * * * even in the exercise of its otherwise legitimate police power." *Allied Structural Steel*, 438 U.S. at 244-245. To this end, the Court examines three questions: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 186 (1992). "The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983).

The analysis of the Seventh Circuit in this case ran aground on the threshold requirement for the exercise of state power: a public purpose. The court held that Wisconsin could impair Chrysler's contract with *no* police power justification, despite this Court's admonition that any state impairment of a contract "must be * * * *for an end which is in fact public* * * *." *Triegle* v. *Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) (emphasis added).

Moreover, the court of appeals compounded its threshold error by holding that the adoption of the 1993 relocation amendment was reasonably foreseeable and therefore not a

substantial impairment of Chrysler's contract. This holding creates a split in the circuits over a crucial element of Contract Clause analysis — what indicia should provide warning to a contracting party that a legislative encroachment is "foreseeable." This conflict undermines the contracting stability of nationwide businesses, particularly national franchisors, which by their very nature require uniformity and predictability.

To correct the pernicious effect of the Seventh Circuit's erroneous decision in this case, which unsettles expectations in an area of commerce that depends on national uniformity, this Court should grant review to decide the questions presented.

A. The Seventh Circuit's Decision Conflicts with This Court's Precedents Requiring a State to Provide a Police Power Justification for Impairing a Contract.

On its face, the Contract Clause creates a blanket prohibition against any state impairment of contracts: "No State shall * * * pass any * * * Law impairing the obligation of Contracts." U.S. CONST. art. I, § 10. But, "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group*, 459 U.S. at 410, quoting *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 434 (1934).

"It is the settled law of this court" that the sole exception to the clear constitutional bar on impairment of contracts is a state's ability to "exercis[e] such powers as are vested in it for the promotion of the common weal." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 503 (1986), quoting *Manigault* v. *Springs*, 199 U.S. 473, 480 (1905). Accord *City of El Paso* v. *Simmons*, 379 U.S. at 508 ("This principle of harmonizing that constitutional prohibition with the necessary residuum of state power has had progressive

recognition in the decisions of this Court.").

While the absolute command of the Contract Clause must bend to accommodate the states' police powers, the Seventh Circuit erroneously concluded that the Contract Clause has been completely "defanged" when a contractual impairment is "small." App. 10a. To the contrary, this Court has repeatedly held that "private contracts are not subject to unlimited modification *under the police power.*" *Allied Structural Steel*, 438 U.S. at 244 n.15 (emphasis added), quoting *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977). And, at a very minimum, states must act *within* their reserved police powers.

The Seventh Circuit disregarded this minimal threshold requirement, which this Court has established in unmistakable terms: "Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised *for an end which is in fact public* * * *." *Triegle* v. *Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936) (emphasis added), quoted in *Viex* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 41 (1940).

The court below recognized that there was no "end which is in fact public" in this case — "the justifications that [the State of Wisconsin's] lawyers have offered for the 1993 amendment are hard to take seriously." App. 10a. In light of the absence of a state police power justification, the court had no authority to bypass the unmistakably clear language of the Contract Clause, under which, as the court below acknowledged, "Chrysler would win hands down." *Id.* at 3a.

This Court has repeatedly emphasized that the *only* reason for not reading the Contract Clause literally is to preserve the states' sovereign police power, but the Court has been careful to point out that this exception cannot swallow the constitutional rule. "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitu-

tional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other." *Blaisdell*, 290 U.S. at 439.

By eliminating the requirement that the state provide *any* police power justification for "small" or "little" impairments of contracts, the court below destroyed the constitutional limitation on impairment of contracts. In effect, the Seventh Circuit construed the police power exception to the Clause so broadly that *no* state police power justification is required, as long as a court can characterize the resulting burden as a "small step." Under this analysis, a state can take advantage of the police power exception and freely impair contracts, if it does so gradually, whether or not the state has *any* justification. And under such an interpretation, the Contract Clause is not merely "defanged" (App. 10a), it is completely toothless.

The court below overlooked not only this Court's requirement that any exception to the plain language of the Contract Clause must be grounded in state police power, but also the underlying purpose of that requirement. This Court has made clear that "[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves Group*, 459 U.S. at 412. The Seventh Circuit acknowledged that the amended Dealer Act "could not be 'sustained as an exercise of the police power'" but failed to recognize that this was "because it served only *private interests,* not health or safety." *Keystone Coal*, 480 U.S. at 484 (emphasis added), quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414 (1922).

The Contract Clause was drafted as a response to widespread state debt-relief laws similarly protecting only the *private interests* of debtors. See *Blaisdell*, 290 U.S. at 427-

28; *Adams* v. *Storey*, 1 F.Cas. 141, 145-46 (C.C.D.N.Y. 1817) (No. 66). Madison explained the injurious effect of letting states impair contracts for private purposes:

> The people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed parts of the community.

THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961). The Founders created a "constitutional bulwark in favor of personal security and private rights" because they realized that allowing states to take the side of individual parties to a contract without a legitimate public purpose would be "contrary to the principles of the social compact and to every principle of sound legislation." *Ibid.*

The court below allowed Wisconsin to make "small" impairments of contracts without any police power justification. Like its historical precedents, the amended Dealer Act was thus designed solely to "provid[e] a benefit to special interests." *Energy Reserves Group*, 459 U.S. at 412. In this way, the amended statute parallels the amended Rhode Island Dealers' Law, the retroactive application of which violated the Contract Clause:

> [t]he predominant thrust of the amendment * * * appears to be to safeguard the private interests of certain automobile dealers * * * rather than to protect any broader societal interest. Without impugning either the role that automobile dealers serve in our society or the wisdom of the [state legislature], this Court cannot elevate the interests which would ineluctably be protected by the retroactive application of this amendment to the level of importance required to justify its otherwise unconstitutional retroactive application.

Scuncio Motors, Inc. v. *Subaru*, 555 F.Supp. 1121, 1130 (D.R.I. 1982) (citations omitted), aff'd, 715 F.2d 10, 13 (1st Cir. 1983).

By allowing a state to impair contracts for purely private purposes, the Seventh Circuit ignored the clear command of the Contract Clause as well as this Court's precedents. Plenary review is necessary to correct this grave constitutional error.

B. The Decision Below Creates a Split in the Circuits Over When Contractual Impairments are Foreseeable.

Even if the Seventh Circuit correctly determined the "threshold matter" of whether the Wisconsin legislature properly exercised its police power in enacting the 1993 relocation amendment, *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 24-25 (1977), the court of appeals erred in its application of the additional Contract Clause limits on the state police power and thereby created a split in the circuits on this issue.

After a state has demonstrated that its legislation is within "th[e] domain of the reserve [police] power of a State," *El Paso*, 379 U.S. at 508, a court must examine "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *General Motors Corp.* v. *Romein*, 503 U.S. 181, 186 (1992).

The Seventh Circuit created a conflict in the lower courts over the definition of when a contractual impairment is "substantial." The courts have long struggled to define "substantial." As the Fourth Circuit has noted, the "Supreme Court * * * has provided little guidance as to what constitutes a 'substantial' contract impairment." *Baltimore Teachers Union* v. *Mayor & City Council of Baltimore*, 6 F.3d 1012, 1017 (4th Cir. 1993).

Building on this Court's statement that "state regulation

that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment," (*Energy Reserves Group*, 459 U.S. at 411), the Seventh Circuit and most other circuits focus on the foreseeability of the law, either as a factor in the analysis or "[o]f * * * controlling, importance." App. 5a; see *Toledo Area AFL-CIO Council* v. *Pizza*, 154 F.3d 307, 324-25 (6th Cir. 1998) (foreseeability mitigates the substantiality of an impairment); *Sanitation & Recycling Indus., Inc.* v. *City of New York*, 107 F.3d 985, 993 (2d Cir. 1997) (holding that the extent of disruption of reasonable expectations is "[t]he primary consideration in determining whether the impairment is substantial"); *Mercado-Boneta* v. *Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 13 (1st Cir. 1997) ("[T]he expectations of the parties * * * play an important role in determining the substantiality of the contractual impairment"); *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383, 385 (8th Cir. 1994) (focusing on "if the party to the contract who is complaining could have seen it coming"); *Nieves* v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1248 (3d Cir. 1987) (examining "contractual expectations"). But see *Baltimore Teachers Union*, 6 F.3d at 1017 n.7, 1018 ("[T]he inquiry into expectations * * * * would appear to be of little probative value in determining whether a particular impairment is substantial"; defining a substantial impairment as one "where the contract right or obligation impaired was the one that induced the parties to enter into the contract and upon the continued existence of which they have especially relied.").

The lower courts' reliance on a "foreseeability" analysis requires some identification of the indicia that make future legislation foreseeable to contracting parties. In *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383, 385 (8th Cir. 1994), the Eighth Circuit determined that the retroactive Iowa Franchise Act was not foreseeable for two reasons: because previous Iowa franchise legislation had not been retroactive

and because the retroactive application of similar franchise statutes elsewhere had "almost uniformly been held unconstitutional." 29 F.3d at 385.

Identical reasons support the unconstitutionality of the 1993 amendment of the Dealer Act at issue here, but the Seventh Circuit, while aware of the Eighth Circuit's decision, (see App. 6a (citing *Holiday Inns,* 29 F.3d 383)), disregarded its holding.

The parallels between the cases could not be clearer. As the Seventh Circuit noted, "previous changes in [Wisconsin] dealership law," like the Iowa franchise legislation, "had been made prospective only, with the exception of one that Wisconsin's highest court struck down under the contracts clause." App. 9a, citing *Wipperfurth* v. *U-Haul Co.*, 304 N.W.2d 767, 773 (Wis. 1981). Franchisors with dealers in Wisconsin were thus under no notice from the Wisconsin legislature that it would, or could legally, deviate from its established practice of making franchise law changes prospective only.

Given these indistinguishable facts, the Seventh Circuit's holding creates a direct conflict with the Eighth Circuit over when contracting parties can reasonably and legitimately rely on state government precedents in anticipating future government regulation.

The Seventh Circuit created a split not only on the effect of previous legislation, but also on the ability of contracting parties to rely on existing case law. The court below held that contracting parties should have "foreseen," and assumed while contracting, that Wisconsin would reject the position consistently followed by other courts rejecting retroactive application of franchise laws. See, *e.g.*, *Northshore Cycles, Inc.* v. *Yamaha Motor Corp.*, 919 F.2d 1041, 1044 (5th Cir. 1990) (retroactive amendments to motorcycle dealership law violate Contract Clause); *Scuncio Motors, Inc.* v. *Subaru*, 555 F.Supp. 1121, 1130 (D.R.I. 1982) (retroactive application of

Dealer's Act unconstitutional), aff'd 715 F.2d 10, 13 (1st Cir. 1983) (retroactive application "present[s] a serious constitutional question"); *Fireside Chrysler-Plymouth Mazda, Inc.* v. *Chrysler Corp.*, 472 N.E.2d 861, 866 (Ill. App. Ct. 1984) (retroactive application of Motor Vehicle Franchise Act unconstitutional); *Ward* v. *Chevron U.S.A., Inc.*, 598 P.2d 1027, 1028-29 (Ct. App. Ariz. 1979) (retroactive application of Petroleum Products Franchises Act unconstitutional); *Yamaha Parts Distr. Inc.* v. *Ehrman*, 316 So.2d 557, 559 (Fla. 1975) (retroactive amendment to state franchise law unconstitutional); *United States Brewers' Association, Inc.* v. *State of Nebraska,* 220 N.W.2d 544, 548-49 (Neb. 1974) (retroactive distributorship law unconstitutional); *Superior Motors, Inc.* v. *Winnebago Indus, Inc.*, 359 F.Supp. 773, 779 (D.S.C. 1973) (retroactive application of franchise law unconstitutional); *Globe Liquor Co.* v. *Four Roses Distillers Co.*, 281 A.2d 19, 21 (Del. 1971) (retroactive application of Franchise Security Law unconstitutional).

Unlike the Seventh Circuit, the Eighth Circuit in *Holiday Inns* recognized that "[i]t is absolutely plain, * * * that the retrospective application of statutes similar to the one here * * * has almost uniformly been held unconstitutional, and *this is a datum on which franchisors are presumably allowed to rely while bargaining* * * *." 29 F.3d at 385 (emphasis added).

The Seventh Circuit's decision leaves contracting parties and the lower courts in disarray. This Court should grant review to settle the law on this important issue.

C. The Issues Presented Here Require a Uniform National Interpretation.

The Seventh Circuit's decision presents important constitutional issues that require national resolution. *First,* the decision requires review because it directly casts doubt on nationwide franchise contracts. The defining characteristics of franchises are their uniform and widespread nature. See,

e.g., *Queen City Pizza, Inc.* v. *Domino's Pizza, Inc.*, 124 F.3d 430, 433 (3d Cir. 1997) ("The essence of a successful nationwide * * * chain is product uniformity and consistency."). Since national uniformity provides a comparative advantage to franchises, a split in the circuits on basic franchise contracting issues is particularly detrimental to these widespread business arrangements. Cf. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 387 (1967) (Stewart & Harlan, JJ., concurring in part and dissenting in part) ("Indiscriminate invalidation of franchising arrangements would eliminate their creative contributions to competition and force suppliers to abandon franchising and integrate forward to the detriment of small businesses.").

Moreover, the Seventh Circuit not only created a direct circuit split on a vital element of Contract Clause analysis, see pages 15-18, *supra,* but it also became the first circuit court to uphold a retroactive franchising statute challenged on Contract Clause grounds. Most courts have barred the retroactive application of franchising statutes or amendments when presented with a challenge under the Contract Clause. See page 18-19, *supra*.

The court of appeals in this case, however, became the first circuit to join the minority position upholding retroactive franchising statutes in the face of Contract Clause challenges. See *Anderson's Vehicle Sales, Inc.* v. *OMC-Lincoln*, 287 N.W.2d 247, 411-12 (Mich. Ct. App. 1980) (sustaining retroactive amendment to dealer agreement statute); *Ruiz* v. *Economics Lab., Inc.*, 274 F.Supp. 14, 17 (D.P.R. 1967) (retroactive Puerto Rico Dealer's Act constitutional); *Willys Motors, Inc.* v. *Northwest Kaiser-Willys, Inc.*, 142 F.Supp. 469, 472 (D.Minn. 1956) (upholding retroactive automobile dealer law).

Second, the Seventh Circuit's decision holding that "a state [can] make[] a contract more costly to one of the parties" (App. 5a) without *any* police power justification

conflicts with established Supreme Court precedents vital to national enterprises like DaimlerChrysler. Large national corporations are the most likely to be taken advantage of by local interests that have the political clout to sweeten their contracts after the fact through improper state impairment of contracts. As one scholar has explained:

> [S]tate and local legislatures contain no representatives of * * * those persons outside the jurisdiction upon whom the weight of the local laws may fall. And since the force of special interest groups is markedly greater in local legislative bodies than in the federal political process, state and local lawmaking that affects * * * persons engaged in interstate activities may not be * * * trusted. The phenomenon is most clearly exemplified by laws that discriminate against outsiders to the benefit of local interests * * *.

Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review,* 89 YALE L.J. 1552, 1584-1585 (1977) (citations omitted).

The Contract Clause was designed to promote national interests and stable transactions. See pages 13-15, *supra*. If the decision below is allowed to stand, the Clause will instead allow state legislatures to become the province of local special interests to the detriment of national commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1998

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 97-3879

CHRYSLER CORPORATION,

Plaintiff-Appellant,

v.

KOLOSSO AUTO SALES, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Wisconsin
Hon. Rudolph T. Randa

Argued April 24, 1998 — Decided July 23, 1998

Before POSNER, Chief Judge, and ROVNER and DIANE P. WOOD, Circuit Judges.

POSNER, Chief Judge.

A clause in Chrysler's franchise contract with one of its dealers, Kolosso Auto Sales, forbids Kolosso to change the location of the dealership from the address in Appleton, Wisconsin specified in the contract unless it gets Chrysler's written permission. The contract was made in 1988, at a time when the Wisconsin Motor Vehicle Dealers Law, Wis. Stat. § 218.01, did not expressly limit an auto manufacturer's right to include such a provision in a dealership contract. But in 1993 the legislature enacted and made applicable to existing as well as to new contracts an amendment to the Motor Vehicle Dealers Law that entitles a dealer to challenge a manufacturer's refusal to permit him to move his dealer-

ship. Wis. Stat. § 218.01(3x). Such a challenge requires the state administrative agency that administers the law to determine whether there is "good cause" for the move. In making this determination the agency

> may consider any relevant factor including:
>
> a. The reasons for the proposed action.
>
> b. The ... reasons for not approving the proposed action.
>
> c. The degree to which the inability to undertake the proposed action will have a substantial and adverse effect upon the motor vehicle dealer's investment or return on investment.
>
> d. Whether the proposed action is in the public interest.
>
> e. The degree to which the proposed action will interfere with the orderly and profitable distribution of products by the [manufacturer].
>
> f. The impact of the proposed action on other motor vehicle dealers.

Wis. Stat. § 218.01(3x)(c).

In 1995, Kolosso informed Chrysler that it wanted to move the dealership to another address in Appleton in order to enable it to consolidate the service facilities of its Chrysler dealership with the service facilities of a Toyota dealership that it owned at that address. Chrysler refused to authorize the move. Kolosso filed a challenge with the state agency. Chrysler responded with the present suit, which seeks to enjoin Kolosso from moving and to declare section 218.01(3x) invalid under the clause of the U.S. Constitution that forbids a state to impair the obligation of contracts. Art. I, § 10, cl. 1. The district court rejected the constitutional claim and granted summary judgment for the dealer.

The administrative proceeding has been stayed pending the outcome of Chrysler's appeal, rather than this appeal being stayed pending the outcome of the administrative procedure. This sequencing does not violate principles of abstention or of exhaustion of remedies. Chrysler claims that forcing it to undergo the ordeal of an administrative proceeding would itself impair its rights under the dealership contract, which gave Chrysler a unilateral, unreviewable right to insist that the dealer stay at the location specified in the contract. Against the cost and uncertainty of the administrative process, the administrative procedure and judicial review of it obviously provide no remedy, so neither abstention nor exhaustion is required. *McCarthy v. Madigan*, 503 U.S. 140, 147, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992); *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122, 126 (2d Cir.1995); *Privitera v. California Board of Medical Quality Assurance*, 926 F.2d 890, 895-96 (9th Cir.1991).

If the contracts clause of the Constitution were read literally, Chrysler would win hands down. It had a contract that obligated the dealer to stay put if Chrysler wanted him to, and the state relieved the dealer of the obligation. Not completely, for it was (and is) possible that Chrysler would persuade the agency that administers the dealership law that it has good cause to forbid this dealer to relocate. But as every employer and employee knows, there is a big difference between having a right (to terminate an employee, or in this case to control a dealer's location) and having a right that depends on showing that there is good cause for its exercise. If the Wisconsin legislature all of a sudden provided that no "at will" contract of employment could be terminated by the employer without good cause, and made the new law applicable to existing employment contracts, this would be a nontrivial impairment of contractual entitlements.

It has been a long time, however, since the contracts clause was interpreted literally. Compare *Ogden v. Saunders*,

25 U.S. (12 Wheat.) 213, 223-24, 6 L.Ed. 606 (1827), and *United States ex rel. Von Hoffman v. Quincy*, 4 Wall. 535, 71 U.S. 535, 550-53, 18 L.Ed. 403 (1867), with *Antoni v. Greenhow*, 107 U.S. 769, 775, 2 S.Ct. 91, 27 L.Ed. 468 (1883), and *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428, 54 S.Ct. 231, 78 L.Ed. 413 (1934). The concern that appears to have animated the progressive relaxation of the clause is that a literal interpretation, like a literal interpretation of other unqualified clauses in the Constitution—notably the free-speech clause, with its flat statement that Congress shall make no law abridging freedom of speech or of the press—might disable government from dealing with emergencies. See *id.* at 425-28, 54 S.Ct. 231. An example is the acute shortage of housing in New York City during World War I, which led the state to enact a law, upheld by the Supreme Court against challenge under the contracts clause, extending residential leases in the City beyond their contractually specified expiration date. *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877 (1921) (Holmes, J.).

Concern about the paralyzing effect of the literal interpretation may be misplaced, or at least exaggerated. The state in the *Marcus Brown* case could have used its eminent-domain power to extend the leases; and this example shows that the consequences of a literal interpretation of the contracts clause would not be so apocalyptic as those of a literal interpretation of the First Amendment. But they would not be trivial, fiscal issues to one side. The literal interpretation would impede governmental efforts to regulate for the future, by grandfathering economic rights that would give their holders a competitive advantage over new firms. Chrysler is seeking a degree of freedom of action in dealing with its dealers that is denied to automobile manufacturers that having made their dealership contracts after the relocation amendment went into effect cannot seek relief under the contracts clause. We must not exaggerate the benefit to Chrysler, since eventually its

contracts will be renegotiated. But neither should we take completely seriously Chrysler's expression of fear that it will lose control over the location of Kolosso's dealership unless the relocation amendment is struck down. Chrysler can pay him to stay in his existing location, and it presumably will do so if the benefit to it exceeds the cost to him. Kolosso wants to move in order to reduce the cost of the repair and other services that he performs and so make more money on those services, even at the cost of fewer car sales because it is not as good a location for selling cars. Chrysler obviously cares more about the car sales. The parties thus have divergent interests, but they can be expected to negotiate to the solution that maximizes the net benefits of their relationship. See R.H. Coase, "The Problem of Social Cost," 3 *J. Law & Econ.* 1 (1960). And likewise in the *Marcus Brown* case, the landlord who had a better use for his property could always pay the existing tenants to leave.

But the fact that the parties to a contract can contract around a legal impediment does not dissolve the contracts clause issue. The state has changed the dealership contract to Chrysler's disadvantage. The result will be an added expense to Chrysler—either the loss of car sales by reason of the relocation or the expense of paying Kolosso not to move. But now that the literal interpretation of the contracts clause has been abandoned, the fact that a state makes a contract more costly to one of the parties does not establish a violation.

Of great, and we are inclined to say controlling, importance in the determination of whether a law violates the contracts clause is the foreseeability of the law when the original contract was made; for what was foreseeable then will have been taken into account in the negotiations over the terms of the contract. Assuming that Chrysler knew back in 1988 when it struck its deal with Kolosso that the location clause in the franchise contract would eventually be brought under regulation, it probably insisted on building the expected cost of that eventuality into the price or other terms of the

contract. If Chrysler thus was compensated in advance for bearing the burden of the regulation, invalidating the regulation would give Chrysler a windfall. Cf. *Eastern Enterprises v. Apfel*, --- U.S. ----, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998).

The centrality of foreseeability explains the courts' emphasis, in deciding whether the application of a new regulation violates the contracts clause, on the degree to which the activity to which the contract pertains was already heavily regulated when the contract was made. E.g., *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983); *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 38, 60 S.Ct. 792, 84 L.Ed. 1061 (1940); *Wisconsin Central Ltd. v. Public Service Comm'n*, 95 F.3d 1359, 1371 (7th Cir.1996); *Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 13-14 (1st Cir.1997); *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8th Cir.1994). The automobile dealership relationship has been heavily regulated in Wisconsin as in other states for many years—in Wisconsin for more than sixty years. See Wis. Stat. § 218.01 (1937). But a history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause. Otherwise Wisconsin could decide to change the price in Chrysler's contracts—which Kolosso concedes the state could not do. *In re Workers' Compensation Refund*, 46 F.3d 813, 820 (8th Cir.1995); *Garris v. Hanover Ins. Co.*, 630 F.2d 1001, 1007 (4th Cir.1980). The fact that some incidents of a commercial activity are heavily regulated does not put the regulated firm on notice that an entirely different scheme of regulation will be imposed. The form and particularly the consequences of such a scheme would be so difficult to foresee that it would be unrealistic to think that the firm had been compensated for the risk of bearing those consequences when it negotiated the original contract. *Allied Structural Steel Co. v. Spannaus*, 438 U.S.

234, 250, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978). Let us not overlook the phrase that ends the well-known passage in *Veix*—"When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation *upon the same topic*." 310 U.S. at 38, 60 S.Ct. 792 (emphasis added; footnote omitted).

Terms like "foreseeability" and "same topic" and "entirely different" are not hard-edged; they call for judgments of degree; and our best judgment is that Chrysler has fallen short of showing a violation. The regulation of which it complains was in the direct path of the plausible (though of course not inevitable) evolution of Wisconsin's program for regulating automobile dealership contracts—for often a law is progressively tightened as experience under its original form discloses gaps—and constituted only a small and predictable step along that path. Long before Chrysler's contract with Kolosso, the auto dealership law had been used to void many standard terms in dealership contracts, notably provisions authorizing the manufacturer to terminate the dealership at will. The statutory language forbidding termination "unfairly, without due regard to the equities or without just provocation" was interpreted to forbid termination without good cause. Wis. Stat. § 218.01(3)(17); *Nagle Motors, Inc. v. Volkswagen North Central Distributor, Inc.*, 51 Wis.2d 413, 187 N.W.2d 374, 385 (1971); *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420, 426 (1955) (dissent that became the majority opinion on rehearing, *id.* at 428). Although the law did not contain a specific provision dealing with relocation other than one allowing a dealer to complain if another dealer relocated into his area, the law's curtailment of the manufacturer's right of termination cast a cloud over *all* contractual clauses restricting a dealer's freedom of action, any one of which might be challenged in application as unfair, inequitable, unprovoked, or, in short, as not being based on good cause.

Suppose that before the 1993 amendment Kolosso had moved the dealership without getting Chrysler's permission and in response Chrysler had terminated the dealership. Kolosso could have brought suit under the auto dealership law claiming that the termination was without good cause because of exigent circumstances requiring the relocation. Rather than terminating Kolosso, Chrysler might have sought an injunction against the move or damages for the breach of the location clause. Kolosso would have defended against such a suit on the ground that Chrysler was acting in bad faith, an implied defense to all breach of contract suits in Wisconsin. *Bozzacchi v. O'Malley*, 211 Wis.2d 622, 566 N.W.2d 494, 495 (1997); *Foseid v. State Bank*, 197 Wis.2d 772, 541 N.W.2d 203, 212 (1995). The defense might have failed, because the contract provides that Michigan law, under which there is no implied duty of good faith "where parties have 'unmistakably expressed' their respective rights," *Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 877 (5th Cir.1989) (applying Michigan law), would govern any disputes arising from the contract—and this may be a principle of Wisconsin law as well. See *Wisconsin Natural Gas Co. v. Gabe's Construction Co.*, 220 Wis.2d 14, 582 N.W.2d 118, 120-22 *2 (1998). But the defense might well have succeeded. A Wisconsin court might refuse to enforce the Michigan doctrine as being contrary to a strong public policy of Wisconsin embodied in the *Motor Vehicle Dealers Law, Bush v. National School Studios, Inc.*, 139 Wis.2d 635, 407 N.W.2d 883, 886-87 (1987); *General Medical Corp. v. Kobs*, 179 Wis.2d 422, 507 N.W.2d 381, 384 (1993), and might hold that under Wisconsin law the override principle does not apply to a *statutory* duty of good faith. We need not decide. Chrysler's legal remedies, whatever precisely they are, could hardly be thought an adequate alternative to the termination that the auto dealership law might, even before the challenged amendment, have blocked. A lawsuit would poison the relationship. To say to Chrysler you may sue your dealer but not terminate him would be like saying to an employer that

if one of your employees breaks his contract you may sue him but not fire him. Cf. *McKnight v. General Motors Corp.*, 908 F.2d 104, 115 (7th Cir.1990).

The 1993 amendment in effect regularized a gray area in the dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate. Before then, as we have said, such disputes were likely to be resolved under a similarly vague substantive standard, only in the context of a termination. The change was thus largely procedural. It was still a real change, and we have no reason to doubt Chrysler's claim that the change hurt it. But it was not a major change—was rather the sort of fine tuning of the statute that Chrysler would have expected to take place from time to time because the statute regulates in such detail a complex commercial relationship. It is true that previous changes in the dealership law had been made prospective only, with the exception of one that Wisconsin's highest court struck down under the contracts clause. *Wipperfurth v. U-Haul Company of Western Wisconsin, Inc.*, 101 Wis.2d 586, 304 N.W.2d 767, 773 (1981). But the Wisconsin legislature had not committed itself to make all future changes prospective—and a rule which said that by making some changes in law prospective a legislature was disabling itself under the contracts clause from making future changes retrospective would encourage retroactive legislation, contrary to the original purpose of the contracts clause. See Douglas Kmiec & John O. McGinnis, "The Contract Clause: A Return to the Original Understanding," 14 *Hastings Const'l* L.Q. 525, 527-28 (1987).

Even big, totally unpredictable impairments of the obligation of contracts can survive challenge under the contracts clause if they are responsive to economic emergencies, *Energy Reserves Group, Inc. v. Kansas Power & Light Co., supra*, 459 U.S. at 411-13, 103 S.Ct. 697; *Home Building & Loan Ass'n v. Blaisdell, supra*, 290 U.S. at 425-28, 54 S.Ct. 231; *Marcus Brown Holding Co. v. Feldman,*

supra, 256 U.S. at 197-99, 41 S.Ct. 465, and even to considerably less exigent needs, *Chicago Board of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 743-44 (7th Cir.1987) (separate majority opinion)—so much less as to impel us in that opinion to describe the contracts clause as having been "defanged." *Id.* at 744. The little, predictable impairments—the ones that take only small steps along a path that was discernible when the original contract was signed—don't have to be justified at all, because the contract itself, as we have emphasized, is likely to contain terms that compensated contracting parties for the foreseeable risks of their relationship. That "impairments" of this character, not *really* being impairments, need not be justified is fortunate for the State of Wisconsin, because the justifications that its lawyers have offered for the 1993 amendment are hard to take seriously. Modern automobile dealers are substantial and sophisticated businesses. Kolosso owns two major dealerships. It sells hundreds of motor vehicles every year, not to mention repair and other services, and though its annual revenues are not in the record, they must exceed $10 million. Kolosso is not colossal; it is not on the scale of a Chrysler; but it is (and so far as we can determine was in 1988 as well) big enough to hire a lawyer capable of negotiating a contract that protected its legitimate interests. It gave up something when it agreed not to relocate without Chrysler's consent and no doubt it was compensated elsewhere in the contract for allowing its freedom of action to be restricted in this way. The essence of contract is limiting the freedom of the contracting parties.

But as we have tried to make clear, a contractual obligation is not impaired within the meaning that the modern cases impress upon the Constitution if at the time the contract was made the parties should have foreseen the new regulation challenged under the clause. Should have foreseen it not in detail of course, but sufficiently to have demanded and received compensation. Chrysler should have known in 1988

that it did not have a solid right to prevent a dealer from changing the location of the dealership, that it was operating in a grey area of the dealership law, that the law might some day be amended to regulate disputes over relocation specifically, and that if this happened it might not be able to get the amendment struck down under the contracts clause. And by virtue of these uncertainties, it would not have had to compensate Kolosso generously for the latter's surrendering his freedom to relocate, for the surrender would only have been partial.

And so there was no violation of the contracts clause—at least on the face of the 1993 amendment. The qualification may be significant. We do not know how the procedure set forth in the amendment will operate. The multiple criteria of "good cause," quoted at the outset of this opinion, make the term nondirective. Suppose it turns out that in practice "good cause" means "only if the dealer agrees to stay." Then in practice the restriction on Chrysler's freedom would be greater than we can know today or assume in this opinion, and the change in the regulatory scheme more abrupt and consequential. Maybe Chrysler could then invoke the contracts clause against the application of the amendment with greater success than in the present case. But we have no reason to believe that the Wisconsin courts will read the statute that way, and so the judgment of the district court must be AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHRYSLER CORPORATION,

Plaintiff(s),

vs.

KOLOSSO AUTO SALES, INC.,

Defendant(s).

Case No. 95-C-1126

DECISION AND ORDER

This matter comes before the Court on objections to Magistrate Judge William E. Callahan's Recommendation that the action be dismissed on abstention grounds. For the following reasons, the objections to the Recommendation are sustained. The Court goes on to the merits of the action as briefed on summary judgment, and grants summary judgment in favor of the defendant.

I

The parties agree that the facts are as set forth in the Magistrate's Recommendation. The Court will not repeat those here. By way of summary, Chrysler Corporation ("Chrysler") objects to the retroactive application of Wis. Stat. § 218.01(3x), which establishes, *inter alia*, an administrative process for reviewing a manufacturer's rejection of a car dealer's relocation request. Chrysler had a dealership arrangement with Kolosso Auto Sales, Inc. ("Kolosso"), pursuant to which Kolosso has operated a Jeep-Eagle dealership at 2701 West College Avenue since 1988. Under the dealership contract, executed before § 218.01(3x) was enacted, Kolosso could not relocate its dealership without Chrysler's prior consent. In July, 1995, Kolosso formally

requested permission to move its dealership to another location approximately one mile away. Chrysler denied this request. In response to this denial, Kolosso filed a complaint with the Wisconsin Division of Hearings and Appeals ("the Division"), requesting a hearing under § 218.01(3x). Chrysler commenced this action in response to that proceeding, seeking a declaratory judgment stating that the retroactive application of § 218.01 (3x) unconstitutionally impairs its pre-existing contractual rights. The parties stipulated to a stay of the administrative proceedings pending a decision herein.

The parties cross-moved for summary judgment. One of Kolosso's arguments on summary judgment suggested that the Court abstain from hearing this matter in light of the pending state administrative proceedings. The Magistrate agreed, finding abstention warranted under both the *Pullman* and *Colorado River* doctrines.

II

Under *Railroad Commission of Texas v. Pullman,* 312 U.S. 496 (1941), abstention is warranted when there is an unsettled question of state law and determination of that question might moot the federal constitutional question or otherwise render a decision thereon unnecessary. (Rec'n at 16.) The Magistrate found *Pullman* abstention warranted on two grounds. First, the Magistrate concluded that there was an unsettled issue of state law. That is, Chrysler had challenged the Division's jurisdiction to hear Kolosso's administrative complaint. It seems that the original version of § 218.01(3x) authorized the Commissioner of Transportation to hear such complaints, but the Office of the Commissioner of Transportation was abolished shortly thereafter. Thus, at the time Kolosso filed its complaint with the Division, there was no official entity formally authorized to hear the complaint. Second, the Magistrate concluded that, even assuming the Division had jurisdiction to hear Kolosso's complaint, a determination on the merits of Kolosso's

complaint by the Division would moot the constitutional question if the Division decided in Chrysler's favor. For these reasons, the Magistrate concluded that *Pullman* abstention was warranted.

The Court respectfully disagrees. First, the Wisconsin Legislature has since amended § 218.01(3x) to authorize the Division to hear complaints like Kolosso's. Wis. Stat. § 218.01(3x)(b)(3) (Supp. 1997). As a consequence, Chrysler has formally withdrawn its objection to the Division's jurisdiction, and that issue no longer remains unsettled. The only remaining "unsettled issue of state law" is the question of "good cause". As Chrysler points out, the question of whether there was "good cause" to reject Kolosso's request is not the type of "unsettled issue of state law" contemplated under the *Pullman* doctrine. Determinations of good cause turn on the particular facts of an individual case; they do not resolve purely legal issues of general applicability to all cases. Thus, the unsettled issue involved here is more one of fact unique to a particular case, not one of law that renders it unnecessary to consider the constitutional question in this or any other case down the road. More importantly, the state law proceedings themselves constitute part of the alleged constitutional harm. That is, the gravamen of Chrysler's constitutional claim is that forcing it to litigate its decision before the Division violates and impairs its pre-existing contractual right to grant or deny Kolosso's requests without administrative oversight. Thus, a decision by the Division in Chrysler's favor does not moot the constitutional issue. It simply inflicts or allows part of the harm Chrysler is trying to prevent by raising the constitutional issue. For these reasons, the Court does not find abstention warranted under the *Pullman* doctrine.

Under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821 (1976), a federal court may abstain from exercising jurisdiction and defer to a concurrent state proceeding when doing so would avoid duplicative

litigation. The question of abstention under *Colorado River* is a two-step inquiry. First, the Court determines whether the state and federal proceedings are "parallel", and if so, the Court then weighs various factors to determine whether "exceptional circumstances" warrant abstention. (Rec'n at 20-21.) Two proceedings are "parallel" when "substantially the same parties are contemporaneously litigating substantially the same issues" in two different forums. (id.) Here, the Magistrate is obviously correct in stating that the same parties are involved in both the state and federal proceedings. But the Court sees little basis for the Magistrate's conclusion that "the issues at stake in both proceedings are identical." (id.) The issue before the Division is whether Chrysler had good cause to deny Kolosso's relocation request. The issue before this Court is whether retroactive application of § 218.01 (3x) is unconstitutional. Not only is the latter issue not before the Division, the Court seriously doubts whether the Division could entertain a constitutional issue. And the question of "good cause", which is the gravamen of the complaint before the Division, will never be an issue in this case. In short, while the parties are the same, the issues in the two proceedings are very different. Indeed, one could say the two proceedings, rather than being "parallel", are actually at cross-purposes, insofar as the federal action seeks to have the state proceedings halted and declared unconstitutional. Thus, the Court concludes that abstention is not warranted under *the Colorado River* doctrine.

Accordingly, for the foregoing reasons, the objections to the Magistrate's Recommendation are sustained and the request to abstain denied.

III

Rather than refer this matter back to the Magistrate for another Recommendation on the constitutional issue, the Court addresses the matter directly. Chrysler seeks a declaratory judgment stating that retroactive application of

§ 218.01(3x) impairs its pre-existing contractual rights in violation of the Contract Clause, which is set forth in Article 1, Section 10 of the United States Constitution and states that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts." To determine whether a state law violates this constitutional provision, "[t]he threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983), quoting *Allied-Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). If it has, then the State must demonstrate a "significant and legitimate public purpose behind the regulation, ... such as the remedying of a broad and general social or economic problem." Id. at 411-12. "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id.* at 412, quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

Addressing the first element of the analysis, "[a] determination of whether a substantial impairment exists involves a three-part inquiry: whether a contractual relationship exists; whether a change in law impairs that contractual relationship; and whether the impairment is substantial." *In re Workers' Compensation Refund Western Nat'l Mutual Ins. Co. v. Lennes*, 46 F.3d 813, 817-18 (8th Cir. 1995). Here, there clearly was a contract. Moreover, the statute clearly impairs Chrysler's rights under that contract, insofar as Chrysler no longer enjoys the right to reject or deny a relocation request at its own discretion and without administrative oversight. Thus, the question is whether the impairment is substantial. As the Supreme Court has stated, "[m]inimal alteration of contractual obligations may end the inquiry at its first stage." *Allied*, 438 U. S. at 245. One of the critical questions in this regard is the extent to which the industry has been regulated

by the State in the past. "A company in a heavily regulated industry is on notice that future legislation may adjust its position." *Nationwide Mutual Ins. Co. v. Comm'r of Insurance,* 397 Mass. 416, 424 (Mass. 1986); see also, *Energy Reserves*, 459 U.S. at 413 ("Significant here is the fact that the parties are operating in a heavily regulated industry."); *In re Workers,* 46 F.3d at 820 ("Heavy regulation of an industry may reduce reasonable expectations."); *Ross v. City of Berkeley,* 655 F. Supp. 820, 828 (N.D.Cal. 1987) ("Also significant is the extent to which the industry entered into by the contracting parties was supervised by the state at the time of the agreement.").

Wisconsin has regulated the motor vehicle dealership industry for decades. Section 218.01 is part of the Wisconsin Auto Dealership Law, which was enacted in 1935. *Forest Home Dodge, Inc. v. Karns,* 29 Wis.2d 78, 85 (Wis. 1965). The statute "was enacted in recognition of the long history of the abuse of dealers by manufacturers." *Id.* "These laws deal with the relationship between auto manufacturers and auto dealers. The purpose of the law is to furnish the dealer with some protection against unfair treatment by the manufacturer." *Id.* Similar to § 218.01(3x), "[e]arlier enactments had guarded against specific evils occasioned by what the legislature considered the unfair or overreaching tactics of manufacturers, *e.g.,* forced acceptance of unordered autos or parts (218.01(3)(a)(15)); coercion or unfair treatment through threat of cancellation (218.01(3)(a)(16)); unfair cancellation or refusal to renew franchises, or without due regard to the equities of the dealer (218.01(3)(a)(17))." *Id.* More to the point, Wisconsin's motor vehicle dealership laws have previously established appeal mechanisms for dealers whose business or dealership is at risk of being altered or jeopardized by some specific action of the manufacturer. For example, if a manufacturer wishes to discontinue or cancel a dealership, it must first provide written notice of the same to the Department of Transportation and the dealer at issue, and

the law establishes an administrative review process for the dealer to challenge that decision, a process very similar to the one established by § 218.01(3x). Wis. Stat. § 218.01(bd). Likewise, if a manufacturer wishes to establish or relocate another dealership within the relevant market area of an existing dealership, the manufacturer must serve notice upon the existing dealer, who may then file an administrative complaint seeking to block that decision. Wis. Stat. § 218.01(3)(f). If a manufacturer wishes to modify an agreement with one of its dealers, it must again serve notice, and the dealer may file an administrative complaint challenging the proposed modification. Wis. Stat. § 218.01(3)(frn). If a family member requests permission to succeed a deceased or incapacitated dealer under an existing franchise agreement, and the manufacturer rejects that request, the family member may challenge that decision through an administrative complaint and hearing. Wis. Stat. § 218.01(3c).

In short, not only has the industry at issue been heavily regulated for decades, but many of the regulations have required the manufacturer to show some form of "good cause" in an administrative proceeding before advancing certain courses of action or rejecting others. Indeed, "[t]he whole framework of the law shows that the manufacturer, with his superior bargaining power, is not to be unsupervised in his dealings with the small independent dealer; and that the state, acting through the motor vehicle department, must see to it that the elements of fairness and freedom in bargaining between the parties continues to exist." *Forest Home,* 29 Wis. 2d at 86. Given this regulatory history, Chrysler is hard-pressed to argue that it could not reasonably anticipate the establishment of a similar review process for a dealer's relocation request. It was clearly on notice that its decisions vis-a-vis a particular dealer could be made subject to administrative review by the State, and thus the fact that § 218.01(3x) added yet another area of review did not constitute a substantial impairment of Chrysler's contractual

rights. Having found no substantial impairment, the Court need not consider the remaining elements of Chrysler's claim under the Contract Clause.[1]

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The objections to the Magistrate's Recommendation are sustained;

2. Chrysler's motion for summary judgment is denied, Kolosso's motion for summary judgment is granted, and a declaratory judgment shall be entered in Kolosso's favor stating that the retroactive application of § 218.01(3x) to this relocation dispute is not unconstitutional.

Dated at Milwaukee, Wisconsin, this 14th day of October, 1997.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U.S. District Judge

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[1] Chrysler argues that, although Wisconsin has regulated the motor vehicle dealership industry for decades, it has never regulated an existing dealer's ability to change locations. This is true, but it has regulated the manufacturer's ability to relocate dealerships, which is closely related. Wis. Stat. § 218.01(3)(f). Moreover, "the appropriate inquiry is whether the parties are operating in a heavily regulated industry, and not whether the specific contract right impaired had been subject to prior regulation." *Nationwide Mutual*, 397 Mass. at 424, fn. 8, citing *Energy Reserves*, 459 U.S. at 413-414 (although at the time of contract State did not regulate natural gas prices specifically, its supervision of the industry was extensive and intrusive).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHRYSLER CORPORATION,

Plaintiff,

v.

KOLOSSO AUTO SALES, INC.,

Defendant

Case No. 95-C-1126

Magistrate Judge's Recommendation Regarding
Cross Motions for Summary Judgment

On November 2, 1995, plaintiff Chrysler Corporation ("Chrysler"), commenced this action against defendant Kolosso Auto Sales, Inc., ("Kolosso"), seeking to enjoin Kolosso from attempting to relocate this Jeep-Eagle dealership under the provisions of Wis. Stats. § 218.01(3x). Chrysler also seeks a declaratory judgment that recently enacted Wis. Stats. § 218.01(3x) unconstitutionally impairs Chrysler's pre-existing contractual rights as guaranteed by the Contract Clause which is set forth in Article I, § 10 of the United States Constitution, ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").[1]

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[1] The constitution of the State of Wisconsin contains language which essentially mirrors that of the federal constitution. See Article I, § 12 ("No . . . law impairing the obligation of contracts . . . shall ever be peased.").

This court has federal question jurisdiction pursuant to 28 U.S.C. § 1331.[2] Venue is proper in the Eastern District of Wisconsin. Since not all the parties have consented in writing to magistrate judge jurisdiction, the court has limited jurisdiction pursuant to 28 U.S.C. § 636(b). Currently pending before the court are the parties' cross motions for summary judgment. In addition, the Attorney General of the State of Wisconsin has filed an *amicus curiae* brief which opposes Chrysler's motion for summary judgment. The facts are largely undisputed, and are as follows.

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[2] It should be noted that Kolosso asserts that the Anti-Injunction Act, 28 U.S.C. § 2283, deprives this court of subject matter jurisdiction. The Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

On January 11, 1998, Chrysler filed a Motion for Preliminary Injunction seeking an order preventing Kolosso from proceeding on its statutory claims before the State of Wisconsin, Division of Hearings and Appeals, ("the Division"). In response, Kolosso agreed to "hold the proceedings on its complaint . . . in abeyance until [the] court disposes of this action, either on the grounds of abstention or failure to join an indispensable party or on its merits." (Kolosso's Brief in Opposition to Motion for Preliminary Injunction, p. 3). On January 30, 1998, the court entertained oral argument regarding Chrysler's motion. At that time, the parties indicated that the Division has ordered that the proceedings be suspended until such time as the parties were to request that the Division schedule further proceedings regarding Kolosso's complaint. Because the parties recognized that the Motion for Preliminary Injunction had been rendered moot by the Division's order, they agreed on the record that there would be no need for an order entering a preliminary injunction.

Because Chrysler no longer seeks injunctive relief from this court, and because Kolosso stipulated to the stay of proceedings before the Division, the Anti-Injunction Act, 28 U.S.C. § 2283, in no way affects this court's subject matter jurisdiction.

Background

Chrysler is a Delaware corporation which is licensed as a motor vehicle manufacturer and distributor by the State of Wisconsin under the provisions of the Motor Vehicle Dealership Law, codified in Chapter 218 of the Wisconsin Statutes. Kolosso is a Wisconsin corporation which is licensed as a motor vehicle dealer by the State of Wisconsin also under the provisions of Wis. Stats. § 218.01. Kolosso owns and operates two motor vehicle dealerships in Appleton, Wisconsin. The dealership at issue in this dispute is Kolosso's Jeep-Eagle Dealership which is located at 2701 West College Avenue. Kolosso also owns and operates a Toyota dealership which is located at 3000 W. Wisconsin Avenue.

Jeep-Eagle motor vehicles are manufactured and distributed by Chrysler. On March 17, 1988, Chrysler and Kolosso entered into a Jeep and Eagle Sales and Service Agreement, ("SSA"), whereby Kolosso was authorized to operate an exclusive, stand alone Jeep-Eagle dealership at 2701 West College Avenue. Since August 6, 1993, the date upon which § 218.01(3x) became effective, there has not been an amendment, renewal or modification of the SSA. In March 1988, Kolosso also executed a Dealership Facilities and Location Addendum which provides that Kolosso will conduct operations only at the 2701 West College Avenue location. The addendum, as agreed to by Chrysler and Kolosso, provides that the 2701 West College Avenue location will not be used for any non-Chrysler sales and services activities.

The SSA also expressly provides:

> [Kolosso] shall conduct its Dealership Operations only from the dealership location and dealership facilities . . . [Kolosso] shall not, except as provided for in subparagraph 11(d)(ii) hereunder, either directly or indirectly, establish any place or places for the conduct of its Dealership Operations other than at the Dealership Facilities and Dealership

> Operations location as set forth in the Dealership Facilities and Location Addendum. (SSA, § 11(d)(1)).

The SSA further provides:

> [Kolosso] shall not make any change in the location of Dealership Operations or make any change in the area and use of the Dealership Facilities without the prior written approval of [Chrysler].
>
> (SSA, § 11(d)).

In addition, the Dealership Facilities and Location Addendum states:

> All changes in the dealership facilities and dealership location that may be agreed upon by [Kolosso] and [Chrysler] . . . shall be reflected in [a] new Dealership Facilities and Location Addendum (Addenda) executed by [Kolosso] and [Chrysler]. (See Memorandum in Support of Chrysler Corporation's Motion for Summary Judgment, Exhibit D)

Kolosso has operated its Jeep-Eagle dealership at 2701 West College Avenue since 1988, and has not made any change in the location, use or area of the dealership facilities without Chrysler's approval.

In 1937, the Wisconsin legislature enacted the Motor Vehicle Dealership Law, ("MVDL"), which is codified in Chapter 218 of the Wisconsin Statutes. The MVDL is a regulatory scheme which was created in an attempt to balance the long-recognized disparity in bargaining power between motor vehicle dealers and economically-superior motor vehicle manufacturers. See *Forest Home Dodge, Inc. v. Karns*, 29 Wis.2d 78, 85 (1965); *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488 (1955).

In 1993, the Wisconsin legislature amended Chapter 218 to include Wis. Stats. § 218.01(3x), which became effective

on August 6, 1993. The Wisconsin legislature expressly provided for the retroactive application of § 218.01(3x) to automobile franchise agreements that were in effect prior to its enactment. 1993 Wis. Act 13, § 48.

Section 218.01(3x), provides, in relevant part:

DEALERSHIP CHANGES . . .

(b) 1. If a motor vehicle dealer's agreement with [a manufacturer] requires the [manufacturer's] prior approval of an action proposed to be undertaken by the dealer under this subsection, a dealer may not voluntarily . . . relocate a franchise without giving prior written notice of the proposed action . . .

2. [A manufacturer] who does not approve of the proposed action shall . . . file with the department and serve upon the dealer a written statement of the reasons for its disapproval. The reasons given for the disapproval or any explanation of those reasons by the manufacturer . . . shall not subject the manufacturer . . . to any civil liability unless the reasons given or explanations made are malicious and published with the sole intent to cause harm to the dealer . . . Failure to file and serve a statement within the applicable period shall, notwithstanding the terms of any agreement, constitute approval of the proposed action by the [manufacturer]. If [a manufacturer] files a written statement within the applicable period, the dealer may not voluntarily undertake the proposed action unless it receives an order permitting it to do so from the office of the commissioner of transportation under par. (c)2.

3. A dealer who is served with a written statement by [a manufacturer] under subd. 2 may file with the department and the officer of the commissioner of transportation and serve upon the [manufacturer] a complaint for the determination of whether there is good

cause for permitting the proposed action to be undertaken. The office of the commissioner of transportation shall promptly schedule a hearing and decide the matter. The proposed action may not be undertaken pending the determination of the matter.

(c) 1. In determining if there is good cause for permitting a proposed action to be undertaken, the office of the commissioner of transportation may consider any relevant factor including:

a. The reasons for the proposed action.
b. The [manufacturer's] reasons for not approving the proposed action.
c. The degree to which the inability to undertake the proposed action will have a substantial and adverse effect upon the motor vehicle dealer's investment or return on investment.
d. Whether the proposed action is in the public interest.
e. The degree to which the proposed action will interfere with the orderly and profitable distribution of products by the [manufacturer].
f. The impact of the proposed action on other motor vehicle dealers.

2. The decision of the office of the commissioner of transportation shall be in writing and shall contain findings of fact and a determination of whether there is good cause for permitting the proposed action to be undertaken. The decision shall include an order that the dealer be allowed or is not allowed to undertake the proposed action, as the case may be. The order may require fulfillment of appropriate conditions

before and after the proposed action is undertaken.

Section 218.01(3x) has yet to be applied or interpreted by the Division. Likewise, it has yet to be interpreted by any Wisconsin court.

By letter dated July 28, 1995, Kolosso formally requested Chrysler's permission to move its Jeep-Eagle dealership to a different location approximately one mile away. Under the proposal, Jeep-Eagle sales operations would be conducted at an as-yet unconverted warehouse at 3030 West Wisconsin Avenue in Appleton, and Jeep-Eagle service and parts operations would be conducted at an existing facility housing Toyota sales, service and parts operations at 3000 West Wisconsin Avenue. In a letter incorporating its request, Kolosso stated:

> This proposal will allow us to be more productive and reduce greatly our costs per unit sold and serviced. It will make us more competitive with the much larger volume dealers in our market. It will obviously benefit us, Chrysler and our customers. Your office has expressed some concern with the traffic at [the proposed] location compared to our existing . . . location on College Avenue. However, a recent study we conducted showed that the daily traffic count in front of the proposed location was 11,190, which was greater than the daily traffic count in front of the College Avenue location of 10,780. Also, the reduction in other overhead will enable us to increase our advertising to attract even more traffic to this location.
>
> We have a pending agreement with Russ Darrow to lease the College Avenue location to him, which he needs for his Chrysler-Plymouth operations. This is another reason why the proposal will benefit Chrysler. (See Memorandum in Support of Chrysler Corporation's Motion for Summary Judgment, Exhibit G).

On August 9, 1995, Chrysler denied the request, stating that it preferred the present arrangement with Kolosso. Among the reasons cited for denying Kolosso's request were the following:

> Your proposal requests a relocation from College Avenue to Wisconsin Avenue. As your present location is centered in the heart of the Appleton auto row, with competitive representation surrounding you, a relocation to Wisconsin Avenue will move you away from the primary sport utility competition for Jeep Eagle, (Ford and Chevrolet).
>
> Your proposal calls for a separate Jeep Eagle showroom and dualled service with Kolosso Toyota. As we have previously discussed, CC's annual planning potential for Jeep Eagle in Appleton is 343. With the potential for annual new vehicles sales volumes of this level or even higher, Jeep Eagle is more than capable of standing on its own in Appleton. Your current record sales and profit figures support this position.
>
> The potential of leasing your existing College Avenue facility to Russ Darrow CP has mark for Darrow only, and would allow him an exceptional location for the expansion of used vehicles sales and body shop operations. The opportunities for Darrow at this location are the same for Kolosso. Why move away from a proven high traffic auto row location? Your relocation to a new location will simply allow Darrow to more effectively merchandise late model Jeep Eagle vehicles into the Appleton market. (See Memorandum in Support of Chrysler Corporation's Motion for Summary Judgment, Exhibit H).

On or about September 18, 1996, in response to Chrysler's denial of the request to relocate, Kolosso filed a complaint with the Division. The complaint requested that the Division conduct a hearing and issue an order pursuant to

§ 218.01(3x) that would allow Kolosso to relocate the Jeep-Eagle dealership facility. The Division stayed the proceedings regarding Kolosso's complaint on September 20, 1995, pending mediation pursuant to § 218.01(7m). Mediation was thereafter conducted, but without success.

On November 2, 1995, Chrysler commenced this action for declaratory relief challenging the retroactive application of § 218.01(3x) to its pre-existing contractual relationship with Kolosso. After receiving the assent of the parties, and in view of the commencement of this action, the Division stayed all administrative proceedings on November 27, 1995.

As mentioned in footnote 1 above, Chrysler filed a Motion for Preliminary Injunction on January 11, 1996. However, because the parties recognized that the Motion for Preliminary Injunction had been rendered moot by the Division's entry of a stay, they agreed that there would be no need for court action on the motion for a preliminary injunction. Both Chrysler and Kolosso subsequently filed motions for summary judgment.

On March 1, 1996, the State of Wisconsin requested leave to appear as *amicus curiae* and to file a brief in this matter. The parties did not oppose the State's motion, and it was granted on March 3, 1996.

Analysis

Under the provisions of Rule 66(c), Fed. R. Civ. P., a motion for summary judgment will be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden rests squarely with the party moving for summary judgment to demonstrate that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If there is any doubt as to the existence of a material fact, then those doubts should be resolved in favor of the non-moving party

and summary judgment should be denied. *Wolf v. Fitchburg*, 870 F.2d 1327, 1330 (7th Cir. 1989).

As the parties have pointed out, there are no disputed material facts in the present case. Rather, the primary issue presented by both parties' motions for summary judgment is a question of law — whether retroactive application of § 218.01(3x) unconstitutionally impairs Chrysler's pre-existing contractual right to refuse Kolosso's relocation request. Thus, both parties are seeking a declaratory judgment as to the constitutionality (or unconstitutionality) of the Wisconsin statute. The Declaratory Judgment Act gives federal courts discretionary power to issue declarations regarding "the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201.

The primary basis for Chrysler's challenge to § 218.01(3x) is the Contract Clause which provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. 1, § 10, cl. 1. "The Contract Clause was originally written to prevent the states from enacting debtor relief laws, and the Supreme Court has relied upon the Contract Clause mainly to limit the ability of states to modify public charters and contracts to which a state is a party." *Wisconsin Central Limited v. Public Service Commission*, 95 F.3d 1359, 1370 (7th Cir. 1996) (*citations omitted*). Throughout the 20th century, the Supreme Court has seldom favored the Contract as a mechanism for invalidating state legislation which imposed on private economic relationships. *Id.* Nevertheless, two Supreme Court decisions suggest the re-emergence of the Contract Clause: *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); and *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983).

In *Spannaus*, the Supreme Court wrote:

> Contracts enable individuals to order their personal and business affairs according to their particular needs and

> interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel, 438 U.S. at 245.

In both cases, the Supreme Court articulated a three-step analytical approach for determining whether a challenged state law violates the Contract Clause. The first inquiry is whether the state law has operated as a substantial impairment of a contractual relationship. *Energy Reserves Group*, 459 U.S. at 411. In making such a determination, a reviewing court should consider whether the industry the complaining party has entered has been regulated in the past, and if so, to what extent. *Id.* If there is a significant impairment, a reviewing court must next determine if the impairment is justified by a legitimate public purpose. *Id.* If such a purpose exists, then the court must determine whether the adjustments of the rights and/or responsibilities of the contracting parties are appropriate to the public purpose and are based upon reasonable conditions. *Id.*

In its motion for summary judgment, Chrysler asserts that the retroactive application of § 218.01(3x) impairs its pre-existing contractual right to deny Kolosso's relocation request. Chrysler asserts that, even assuming its relationship with Kolosso is subject to regulation by the State of Wisconsin, such regulation is not so extensive so as to undermine Chrysler's contractual expectations. Chrysler argues that the impairment of its pre-existing contractual right is substantial because § 218.01(3x) gives Kolosso the opportunity to circumvent Chrysler's refusal to consent to a relocation by filing a complaint with the Division. In short, Chrysler argues that the creation of § 218.01(3x) affords Kolosso statutory recourse that it did not have at the time the SSA was executed. And, Chrysler asserts that § 218.01(3x) does not promote a strong public purpose or policy because it was not enacted to protect the general public. Rather, Chrysler

asserts, Chapter 218, as a whole, was enacted to protect automobile dealers, a special interest group, from unfair treatment by automobile manufacturers.

Chrysler also challenges the authority of the Division to hear Kolosso's complaint. It does so on the grounds that the statute vests the Office of the Commissioner of Transportation with the sole authority to conduct hearings pursuant to § 218.01(3x). But, on January 1, 1994, the Office of the Commissioner of Transportation was abolished. See, 1993 Wis. Act. 18. And, at the time Kolosso had filed its complaint with the Division, there had been no subsequent legislation authorizing any Wisconsin agency to adjudicate disputes arising under § 218.01(3x). Thus, Chrysler contends, the Division is without jurisdiction to hear the dispute.

Kolosso on the other hand argues that, because Wisconsin has continuously and extensively regulated the automobile manufacturer-dealer relationship since 1937, Chrysler's contract expectations are not impaired by the retroactive application of § 218.01(3x). Second, Kolosso argues that, even if Chrysler's contractual expectations are impaired, the impairment is not substantial. This is so, Kolosso asserts, because the statute provides that, in reviewing Kolosso's complaint, the Division must consider: (1) Chrysler's reasons for not approving the relocation request, (See § 218.01(3x)(b)3(c)1b); and (2) the degree to which the proposed relocation will interfere with the orderly and profitable distribution of products by Chrysler. (See § 218.01(3x)(b)3(c)1e). Third, Kolosso asserts that § 218.01(3x) serves a significant and legitimate public interest because it promotes fair dealing. And, Kolosso asserts that relocation of its automotive dealership will result in increased economic efficiency as well as a reduction in overhead costs. Kolosso contends that these benefits will ultimately pass onto

the general public.[3] Finally, Kolosso asserts that this court should abstain from entertaining Chrysler's declaratory judgment suit in light of the pending proceeding before the Division.

In its *amicus curiae* brief, the State of Wisconsin joins Kolosso in asserting that: (1) retroactive application of § 218.01(3x) does not impair Chrysler's contractual rights; and, (2) even if this court finds impairment, it is justified by the state's legitimate exercise of its police powers. Second, the State of Wisconsin asserts that Chrysler's federal challenge to the authority of the Division under Wisconsin law violates the concept of federalism. Third, the State of Wisconsin argues that Chrysler's constitutional challenge to § 218.01(3x) is not ripe because the Division has yet to act on Kolosso's complaint. The State of Wisconsin asserts that it remains a matter of speculation as to whether the Division would sustain or reject Kolosso's complaint, and on what grounds. Moreover, it points out that the Division could very well decide in favor of Chrysler. Finally, the State of Wisconsin argues that this court should abstain from entering a declaratory judgment pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), because this case presents potentially dispositive state law issues which may obviate the need to decide Chrysler's federal claims.

Abstention

Before I consider reaching the merits of the parties' respective motions for summary judgment, the potentially dispositive matter of abstention must be addressed.

It is well-settled that federal courts have a strict duty to exercise the jurisdiction that has been conferred upon them by

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[3] Kolosso also argues that, pursuant to 28 U.S.C. § 2283, the Anti-Injunction Act, this court lacks subject matter jurisdiction to enjoin ongoing state proceedings. This argument was previously addressed in footnote 2.

Congress. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 821 (1976). However, the Supreme Court recently emphasized that the duty to exercise federal jurisdiction is not absolute. *Quackenbush v. Allstate Insurance Co.*, --- U.S. ---, ---, 116 S.Ct. 1712, 1720 (1996). Indeed, the court noted that "federal courts may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an important countervailing interest." *Id.* (*citing Colorado River*, 424 U.S. at 813). In that connection, the Supreme Court has recognized several abstention doctrines under which federal courts may properly refrain from exercising their jurisdiction.

These doctrines include: (1) Pullman-type abstention, to avoid needless determination of a federal constitutional question until the state court has had an opportunity to resolve state law questions (See *Railroad Commission of Texas, v. Pullman Co.*, 312 U.S. 496 (1941); (2) Burford-type abstention, to avoid needless conflict with the state's administration of its own affairs; (*See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)); (3) *Younger*-type abstention, to avoid interference with pending state criminal proceeding, (*See Younger v. Harris*, 401 U.S. 37, (1971)), or with certain types of state civil proceedings. (See *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975)); and, (4) *Colorado-River*-type abstention, to avoid duplicative litigation (*See Colorado River*, 424 U.S. 800).

The question of whether the doctrine of abstention should be invoked is a matter of discretion, *Harman v. Foresenius*, 380 U.S. 528 (1965), which must be determined on a case-by-case basis. *Baggett v. Bullitt*, 377 U.S. 360 (1964).

1. *Pullman* Abstention

In *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, the defendant challenged the constitutionality of an order issued by the Texas Railroad Commission relating to the employment of conductors on trains which contained sleeping cars. The defendant also challenged the Commission's authority to issue such an order. The Supreme Court held that the lower court should have stayed the federal proceeding until the issue of whether the Commission had jurisdiction to issue the order could be decided in an underlying state proceeding. *Pullman*, 312 U.S. at 501. The court explained the principles underlying its decision:

> Few public interests have a higher claim that the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, or the administration of a specialized scheme for liquidating embarrassed business enterprises, or the final authority of a state court to interpret doubtful regulatory laws of the state. These cases reflect a doctrine of abstention appropriate to our federal system, whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary.

Id., at 500-501 (*citations omitted*).

Pullman abstention is appropriate when there is an unsettled question of state law, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 (1984), and determination of relevant state law might moot or change the posture of the federal constitutional question. *Colorado River*, 424 U.S. at 814.

Both the State of Wisconsin and Kolosso argue that *Pullman* abstention is appropriate in this case because there is an unsettled question of state law. Specifically, they point

out that, in addition to challenging the constitutionality of the retroactive application of § 218.01(3x), Chrysler has challenged the Division's jurisdiction to hear Kolosso's relocation complaint. Whether a state agency has jurisdiction to act under a particular state statute, they argue, is a matter that is peculiarly within the province of the law of the State of Wisconsin. The State of Wisconsin and Kolosso also argue that *Pullman* abstention is appropriate in this case because a determination of relevant state law could moot or change the posture of the federal constitutional question. Both point out that since its enactment, § 218.01(3x) has yet to be applied or interpreted by the Division, or by any Wisconsin court. Moreover, they contend that allowing Kolosso's complaint to proceed before the Division might obviate the need to address Chrysler's constitutional claims precisely because the Division could sustain Chrysler's denial of Kolosso's relocation request.

The State of Wisconsin and Kolosso maintain that the Division should first be given the opportunity to decide the question of its jurisdiction, as well as the merits of Kolosso's complaint. Both argue that Chrysler's constitutional challenges can and should be raised in the same forum in which the other issues will be decided, *i.e.*, before the Division. Kolosso points out that, under Wisconsin law, the Division's decision is then subject to two levels of mandatory appellate review. See Wis. Stats., § § 227.46(2m) and 227.52. Chrysler can seek review of its constitutional challenges by way of the Wisconsin appellate system, and potentially by the United States Supreme Court.

Chrysler has failed to offer a meaningful response to the argument that its challenge to the Division's jurisdiction presents an unsettled question of state law. Ironically, while advancing its challenge to the Division's jurisdiction, Chrysler asserts that this issue must be decided under the state law which was in effect at the time Kolosso filed its complaint. (See Chrysler Corporation's Reply Memorandum In Support

of its Motion for Summary Judgment, p. 8). By doing so, Chrysler all but concedes that Wisconsin law is determinative on the issue of whether the Division has jurisdiction to hear Kolosso's complaint.

Thus, Chrysler's complaint presents a question of state law. And, because neither the Division, nor any Wisconsin court has yet to address any aspect of § 218.01(3x), the issue of the Division's jurisdiction to hear Kolosso's complaint is most definitely unsettled.

Chrysler disputes the assertion that a determination of Kolosso's complaint by the Division could moot or change the posture of its federal constitutional claim. In support of its position, Chrysler points out that on August 6, 1993, the Wisconsin legislature made § 218.01(3x) applicable to all pre-existing contracts, including the SSA at issue in this case. Thus, Chrysler argues that, regardless of the Division's ultimate decision, "the damage has been done." In addition, Chrysler asserts that, in reviewing Kolosso's relocation request, the Division cannot consider Chrysler's constitutional challenges to § 218.01(3x) because Chapter 218 does not empower the Division to entertain constitutional questions.

In considering whether a determination of Kolosso's complaint by the Division could moot or change the posture of Chrysler's constitutional claim, I have come to the following conclusions. First, I disagree with Chrysler's position that "regardless of the substantive result, any application of § 218.01(3x) will result" in a violation of Chrysler's constitutional rights. (Chrysler Corporation's Reply Memorandum in Support of its Motion for Summary Judgment, p. 7) (*emphasis supplied*). Merely because the Wisconsin legislature has articulated its intent that § 218.01(3x) be retroactively applied, does not change the fact that the status quo remains intact — Kolosso has not attempted to relocate its dealership, *i.e.*, the SSA has not been breached. Moreover, by seeking licensure as a motor

vehicle manufacturer and distributor under the provisions of the MVDL, Chrysler knowingly subjected itself to Wisconsin's extensive regulation of Chrysler's relationship with Kolosso. Since its creation in 1937, the MVDL has changed and significantly expanded. (See *Forest Home Dodge, Inc. v. Karns*, 29 Wis.2d 78, 86 (1965); *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488 (1955)). When Chrysler entered into the SSA with Kolosso, it knew that the subject matter of that contract had a history of heavy regulation by the State of Wisconsin. Therefore, Chrysler's assertions that the mere enactment and purported retroactive application of § 218.01(3x) have operated as an impairment of the SSA ring rather hollow.

Second, it is entirely possible that the Division could reject Kolosso's complaint and support Chrysler's denial of the relocation request. In other words, the Division could recognize the contractual limitations contained in the SSA regarding dealership relocation, and could bind Kolosso to them. Because the statute could be applied in a manner that is consistent with Chrysler's contractual rights, I conclude that a determination of relevant state law might render moot, or change the posture of, the federal constitutional question presented in the case.

In sum, I conclude that this case presents an unsettled issue of state law (specifically, whether the Division has jurisdiction to hear Kolosso's complaint). In addition, I conclude that a determination on the merits of Kolosso's complaint by the Division could moot or change the posture of Chrysler's federal constitutional claim. Based on these conclusions, I recommend that the district court abstain from entertaining Chrysler's declaratory judgment action pursuant to *Pullman*, 312 U.S. at 496.

2. *Colorado River* Abstention

Although neither Kolosso, nor the State of Wisconsin rely on the *Colorado River* doctrine of abstention, it is, in my

view, also applicable to the present case. In *Colorado River*, 424 U.S. at 821, the Supreme Court held that a federal court may abstain from exercising its jurisdiction and defer to a concurrent state proceeding when doing so avoids duplicative litigation.

Determining whether to abstain under *Colorado River*, involves a two-step inquiry. First, a court must determine whether the concurrent state and federal proceedings are "parallel." *Caminiti and Iaterola, Ltd. v. Behnke Warehousing, Inc.*, 962 F.2d 698, 700 (7th Cir. 1992). Two proceedings are "parallel" when "substantially the same parties are contemporaneously litigating substantially the same issues" in two different forums. *Id.* The parties involved in the proceeding before the Division are precisely the same parties involved in this federal action. Likewise, the issues at stake in both proceedings are identical. I, therefore, conclude that the proceedings are parallel.[4]

Having determined that the two proceedings are parallel, I must next weigh various factors identified in Colorado River, and its progeny, to see whether "exceptional circumstances" justify abstention. *Caminiti and Iatarola*, 982 F.2d at 700. These factors include:

> 1) whether the state has assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which jurisdiction was obtained by the concur-

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[4] I note that the concurrent state proceeding in this case is not before a Wisconsin court, but rather, is before an administrative agency. However, the Wisconsin Division of Hearings and Appeals is an agency which is empowered to conduct quasi-judicial proceedings wherein an Administrative Law Judge issues findings of fact and conclusions of law. Ultimately, those findings and conclusions are subject to review by the Wisconsin courts. Under these circumstances, the fact that the concurrent state proceeding is administrative in nature does not alter my conclusion that the proceedings are parallel.

> rent forums; 5) the source of governing law, state or federal; 6) the adequacy of [the] state-court action to protect the federal plaintiff's rights; 7) the relative progress of state and federal proceedings; 8) the presence or absence of concurrent jurisdiction; 9) the availability of removal; and 10) the vexatious or contrived nature of the federal claim.

LaDuke v. Burlington Northern R.R. Co., 879 F.2d 1556, 1559 (7th Cir. 1989). No single factor is necessarily determinative, and the factors are not to be applied mechanically, but "flexibly and pragmatically." *Id.*

In my view, several factors weigh in favor of abstention. First of all, the fourth factor, *i.e.* the order in which jurisdiction was obtained by the concurrent forums, weighs in favor of abstention. This is because the proceeding before the Division was initiated prior to Chrysler's commencement of the federal action. Likewise, the seventh factor, *i.e.* the progress made in the two cases, also suggests that abstention is appropriate. Indeed, the parties had pursued mediation of Kolosso's complaint, as required by § 218.01(7m), prior to the commencement of the federal action.

The fifth factor, *i.e.* the source of governing law, as well as the sixth factor, *i.e.* the adequacy of the state action to protect the plaintiff's rights, weigh heavily in favor of abstention. Although some of the issues raised in Chrysler's federal complaint require the application of federal law, Chrysler's objection to the Division's jurisdiction is controlled by Wisconsin law. And, a determination of the merits of Chrysler's Contract Clause claim will require significant analysis of the MVDL, Wisconsin's long-standing regulation of the motor vehicle dealer-manufacturer relationship. With respect to the sixth factor, even assuming *arguendo* that the Division, as Chrysler claims, lacks the authority to consider its constitutional claims, the Division's decision is reviewable by the Wisconsin courts. And state judges have the power,

indeed the duty, to pass on questions of federal law that arise in cases properly brought in their courts. *Testa v. Katt*, 330 U.S. 386 (1947). The Wisconsin courts can determine the merits of Chrysler's Contract Clause if presented with that issue. *See Cousins v. Wigoda*, 463 F.2d 603, 607 (7th Cir. 1972).

The remaining factors are either inapplicable to the present case, or do not weigh either for or against abstention.

After consideration of all relevant factors, I conclude that there are exceptional circumstances which justify abstention under the *Colorado River* doctrine. In my opinion, resolution of the entire matter (including the jurisdictional question, the constitutional challenge, as well as the relocation dispute itself) is most efficiently and prudently handled in a Wisconsin forum, initially by the Division, and thereafter by the Wisconsin courts. I, therefore, recommend that the district court abstain from entertaining Chrysler's declaratory judgment action pursuant to *Colorado River*, 424 U.S. at 821.

CONCLUSION

I find that abstention is appropriate under both the *Pullman* doctrine and the *Colorado River* doctrine. In *LaDuke*, 879 F.2d at 1561-62, the Seventh Circuit held that a stay, rather than an outright dismissal, is the proper procedural mechanism to employ when deferring to a parallel state proceeding under the *Colorado River* doctrine. However in *Moses v. County of Kenosha*, 826 F.2d 708, 710 (7th Cir. 1987), the Seventh Circuit stated, "these doctrines [referring to the *Colorado River* and *Burford* doctrines of abstention] share with *Pullman* and *Younger* the characteristic that, when applicable, they require the district court to dismiss all claims without prejudice to the plaintiff's right to raise the same contentions in a state tribunal." This presents the court with the question of which step, stay or dismissal, is the proper step to take in this case.

Recently, the Supreme Court provided some guidance on this question. In *Quackenbush v. Allstate Insurance Co.*, --- U.S. ---, ---, 116 S.Ct. 1712, 1723 (1996), the Supreme Court held that:

> [I]n cases where the relief being sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court.

The court further noted that suits brought pursuant to the Declaratory Judgment Act are within the discretionary category that is subject to dismissal. *Id.* at 1722, 1728. This holding is consistent with other Supreme Court decisions which recognize the nature of a declaratory judgment action. (See, *e.g. Wilton v. Seven Falls Co.*, --- U.S. ---, ---, 115 S.Ct. 2137, 2143 (1995) (*citation omitted*); "We have repeatedly characterized the Declaratory Judgment Act as 'an enabling Act which confers a discretion on the courts rather than an absolute right upon [a] litigant;'" *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962); "The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of right; it did not impose a duty to do so.").

In the present case, the initial issue which must be decided, *i.e.* whether the Division has jurisdiction to hear Kolosso's complaint, unquestionably involves the application of Wisconsin law. Likewise, the second issue presented by this case, *i.e.* whether there is good cause to allow Kolosso to relocate its dealership, will entail applying newly created § 218.01(3x) to a dealer-manufacturer dispute for the first time. I have already concluded that a Wisconsin forum, *i.e.* the Division and thereafter the Wisconsin courts, is better suited to apply § 218.01(3x) in a manner that is consistent with Wisconsin's longstanding regulatory scheme. As

discussed above, Chrysler's Contract Clause claim only comes into play if the Division exercises jurisdiction pursuant to § 218.01(3x), and determines that Kolosso has good cause to relocate its dealership. Thus, the only constitutional issue presented by this case may never come to fruition. And, even if it does, Chrysler will have an opportunity to raise that issue, at the very least, before the Wisconsin Courts.

After careful consideration of the issues at stake, I see no reason why this court should retain jurisdiction over this case when, in the event Chrysler's Contract Clause claim arises (that is, in the event the Division approves Kolosso's relocation request), the Wisconsin courts are perfectly able to assess the merits of Chrysler's constitutional claim. Resolution of all of the relevant issues in a single proceeding is, in my opinion, the most efficient way to move this case forward. Given all of the above, I recommend that the district court issue an order dismissing this action without prejudice.

IT IS, THEREFORE, RECOMMENDED that the District Court abstain from entertaining this declaratory judgment action, pursuant to both *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

IT IS FURTHER RECOMMENDED that the District court enter an order dismissing this action without prejudice.

Any objection to this recommendation must be filed with the Clerk of Court, in duplicate, within ten days of service of the same. See Rule 73, Fed. R. Civ. P., and Local Rule 13.02 (E.D. Wis.). Failure to file a timely objection shall result in a waiver of your right to appeal all factual and legal issues.

Dated at Milwaukee, Wisconsin this 7th day of January, 1997.

/s/ William E. Callahan, Jr.

WILLIAM E. CALLAHAN, JR.
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 97-3879

September 18, 1998

Before

Hon. Richard A. Posner, Chief Judge
Hon. Ilana Diamond Rovner, Circuit Judge
Hon. Diane P. Wood, Circuit Judge

CHRYSLER CORPORATION,

Plaintiff-Appellant,

v.

KOLOSSO AUTO SALES, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin

Rudolph T. Randa, Judge

ORDER

On August 6, 1998, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing *en banc* and on August 28, 1998, defendant-appellee filed an answer. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

APPENDIX E

WISCONSIN STATUTES

218.01. Motor vehicle dealers; salespersons; sales finance companies, licenses; fees; regulations; coercion; subsidies; penalties

* * *

(3x) Dealership changes. (a) In this subsection, "affected grantor" means a manufacturer on direct dealerships, a distributor on indirect dealerships or an importer on direct dealerships that has entered into an agreement with a motor vehicle dealer and that is directly affected by an action proposed to be undertaken by the dealer under this subsection.

(b) 1. If a motor vehicle dealer's agreement with an affected grantor requires the grantor's prior approval of an action proposed to be undertaken by the dealer under this subsection, a dealer may not voluntarily change its ownership or executive management, transfer its dealership assets to another person, add another franchise at the same location as its existing franchise or relocate a franchise without giving prior written notice of the proposed action to the affected grantor and to the department of transportation. Within 20 days after receiving the notice, the affected grantor may serve the dealer with a written list of the information not already known or in the possession of the grantor that is reasonably necessary in order for the grantor to determine whether the proposed action should be approved. The grantor shall, in good faith, confirm in writing to the dealer the date on which it has received from the dealer or from other sources all the information specified on the list.

2. An affected grantor who does not approve of the proposed action shall, within 30 days after receiving the dealer's written notice of the proposed action or within 30 days after receiving all the information specified in a written

list served on the dealer under subd. 1., whichever is later, file with the department of transportation and serve upon the dealer a written statement of the reasons for its disapproval. The reasons given for the disapproval or any explanation of those reasons by the manufacturer, distributor or importer shall not subject the manufacturer, distributor or importer to any civil liability unless the reasons given or explanations made are malicious and published with the sole intent to cause harm to the dealer or a transferee of the dealer. Failure to file and serve a statement within the applicable period shall, notwithstanding the terms of any agreement, constitute approval of the proposed action by the grantor. If an affected grantor files a written statement within the applicable period, the dealer may not voluntarily undertake the proposed action unless it receives an order permitting it to do so from the division of hearings and appeals under par. (c)2.

3. A dealer who is served with a written statement by an affected grantor under subd. 2. may file with the department of transportation and the division of hearings and appeals and serve upon the affected grantor a complaint for the determination of whether there is good cause for permitting the proposed action to be undertaken. The division of hearings and appeals shall promptly schedule a hearing and decide the matter. The proposed action may not be undertaken pending the determination of the matter.

(c) 1. In determining if there is good cause for permitting a proposed action to be undertaken, the division of hearings and appeals may consider any relevant factor including:

a. The reasons for the proposed action.

b. The affected grantor's reasons for not approving the proposed action.

c. The degree to which the inability to undertake the proposed action will have a substantial and adverse

effect upon the motor vehicle dealer's investment or return on investment.

d. Whether the proposed action is in the public interest.

e. The degree to which the proposed action will interfere with the orderly and profitable distribution of products by the affected grantor.

f. The impact of the proposed action on other motor vehicle dealers.

2. The decision of the division of hearings and appeals shall be in writing and shall contain findings of fact and a determination of whether there is good cause for permitting the proposed action to be undertaken. The decision shall include an order that the dealer be allowed or is not allowed to undertake the proposed action, as the case may be. The order may require fulfillment of appropriate conditions before and after the proposed action is undertaken.

(d) This subsection does not apply to:

1. An action that has been agreed to in writing between a dealer and each affected grantor.

2. A proposed action that would require an affected grantor to give notice under sub. (3)(f)1, except that the dealer must have the affected grantor's written approval before undertaking any such proposed action.

3. The exercise by an affected grantor under an agreement of the right of first refusal to acquire the dealer's assets in the event of a proposed change of ownership or transfer of dealership assets, if all of the following requirements are met:

a. The exercise of the right of first refusal will result in the dealer and the dealer's owners receiving the same or greater consideration as they have contracted to

receive in connection with the proposed change of ownership or transfer of dealership assets.

b. The proposed change of ownership or transfer of dealership assets does not involve the transfer of assets or the transfer or issuance of stock by the dealer or one or more dealer owners to one or more immediate family members of one or more dealer owners or to a qualifying member of the dealer's management or to a partnership, limited liability company or corporation controlled by such persons. In this subd. 3.b., "immediate family member" means the spouse, child, grandchild, spouse of a child or grandchild, brother, sister or parent of the dealer owner; and "qualifying member of the dealer's management" means an individual who has been employed by the dealer for at least 2 years and who otherwise qualifies as a dealer operator.

c. The affected grantor agrees to pay the reasonable expenses, including reasonable attorney fees that do not exceed the usual, customary and reasonable fees charged for similar work done for other clients, incurred by the proposed new owner or transferee before the grantor's exercise of its right of first refusal in negotiating and implementing the contract for the proposed change of ownership or transfer of dealership assets. Notwithstanding this subd. 3.c., no payment of expenses and attorney fees shall be required if the dealer has not submitted or caused to be submitted an accounting of those expenses within 7 days after the dealer's receipt of the affected grantor's written request for an accounting.

4. An action, if a proposed new owner or transferee does not agree to comply with the agreement between the affected grantor and dealer or with a new agreement containing substantially the same terms.

APPENDIX F

RULE 29.6 DISCLOSURE

Pursuant to Supreme Court Rule 29.6, the following is a list of the nonwholly owned subsidiaries of petitioner DaimlerChrysler Corporation.

1981 Helicopters Ltd.

104462 Canada Ltd.

2813009 Canada Inc.

2813017 Canada Inc.

2813025 Canada Inc.

A.C. Austro Car Handelsgesellschaft m.b.H.

Adelaide FSC, Ltd.

Advanced Leasing Services Number 3, Inc.

AIA, Inc. of Pennsylvania

Aire y Temperatura S.A. Colonia Anahuac

Alice Springs Ltd.

American Auto Handels G.m.b.H.

American Auto Receivables Company

American Motors (Canada) Inc.

American Motors Pan American Corporation

Anaheim Dodge, Inc.

Arab American Vehicles Company

Artesia Turbine Cogeneration Corporation

Auto/Oil Air Quality Improvement Research Program

Auto Receivables Corporation

Autohaus Havelstrasse G.m.b.H

Automotive Exporters Inc.

Automotive Financial Services, Inc.

Automotive Polmer-Based Composites Joint Research and Development Partnership

Baltimore Compost I Corporation

Baltimore Compost II Corporation
Becker Auto-Technic G.m.b.H.
Beijing Jeep Corporation, Ltd.
Boulevard Dodge Chrysler (1991) Inc.
Bramco Satellite Inc.
CAD/CAM Partnership
Capital Plymouth Chrysler, Inc.
Cara FSC Ltd.
CC Funding Corporation
CF Holding G.m.b.H.
Chase Securities Japan Limited
Chrysler (Taiwan) Co., Ltd.
Chrysler Argentina, S.A.
Chrysler Asia-Pacific Pte. Ltd.
Chrysler Asset Management Corporation
Chrysler Australia Pty. Ltd.
Chrysler Austria Ges. M.b.H.
Chrysler Auto Receivables Company
Chrysler Automobilvertrieb G.m.b.H.
Chrysler Automotive Services GmbH
Chrysler Bank GmbH
Chrysler Belgium Luxembourg S.P.R.L.
Chrysler Cadre Inc.
Chrysler Canada Ltd.
Chrysler Capital Corporation
Chrysler Capital Financing Corporation
Chrysler Capital Fund Management Corporation
Chrysler Capital Funding Corporation
Chrysler Capital Investment Services, Inc.
Chrysler Capital Public Finance Corp.
Chrysler Capital Realty II, Inc.

Chrysler Capital Realty Inc.
Chrysler Capital Transportation Services, Inc.
Chrysler Chile Importadora L.L.C.
Chrysler Comercial S.A. de C.V.
Chrysler Commercial Leasing Corporation
Chrysler Concord Corporation
Chrysler Consortium Corporation
Chrysler Corporation Fund
Chrysler Credit Canada Ltd.
Chrysler Credit de Puerto Rico N.V.
Chrysler Credit Holdings Ltd.
Chrysler Credit Realvest Inc.
Chrysler de Mexico S.A.
Chrysler de Venezuela, L.L.C.
Chrysler Do Brasil Ltda.
Chrysler Dunwoody, Inc.
Chrysler Egypt Limited
Chrysler Engineering S.A.
Chrysler Europe S.A.
Chrysler Factoring, S.A. de C.V.
Chrysler Finance Limited
Chrysler Financial Corporation
Chrysler Financial Financing Corporation
Chrysler Financial France S.A.
Chrysler Financial Japan Limited
Chrysler Financial Overseas Capital N.V.
Chrysler Financial Receivables Corporation
Chrysler Financial Taiwan Co., Ltd.
Chrysler Finanical Bank B.V.
Chrysler Finanziaria Italia S.p.A.
Chrysler Finland OY

Chrysler First Acceptance Corporation
Chrysler First Business Credit Corporation
Chrysler First Commercial Corporation
Chrysler First Consumer Discount Company
Chrysler First Financial Services Corporation of Florida
Chrysler First Financial Services Corporation of America
Chrysler First Inc.
Chrysler First Industrial Loan Company
Chrysler First Mortgage Corporation of Florida
Chrysler Foreign Sales Corporation
Chrysler France SAS
Chrysler Glenview Corporation
Chrysler Import Belgium S.P.R.L.
Chrysler Import Deutschalnd G.m.b.H.
Chrysler Import Holland BV
Chrysler Institute of Engineering
Chrysler Insurance Company
Chrysler International Corporation
Chrysler International Limited LLC
Chrysler International S.A.
Chrysler International Services S.A.
Chrysler Italia S.R.L.
Chrysler Japan Sales Limited
Chrysler Korea Sales Limited
Chrysler Leasing Corporation
Chrysler Leasing G.m.b.H.
Chrysler Life Insurance Company of Canada
Chrysler Life Insurance Company
Chrysler MacNally Corporation
Chrysler Management Services G.m.b.H.
Chrysler Mauritius International Company

Chrysler Meadowcroft Corporation
Chrysler Meridian Corporation
Chrysler Motors Corporation
Chrysler Motors de Venezuela, S.A.
Chrysler Natural Resources Development Corporation
Chrysler Nederland B.V.
Chrysler Overseas Trading Company Ltd.
Chrysler Pentastar Aviation, Inc.
Chrysler Rail Transportation Corporation
Chrysler Realty Corporation
Chrysler RRPF (UK) Limited
Chrysler Sales and Services (Thailand) Ltd.
Chrysler Service Contracts, Inc.
Chrysler Servicios Corporativos, S.A. de C.V.
Chrysler Technologies Middle East Ltd.
Chrysler Timberlake Corporation
Chrysler Transport, Inc.
Chrysler Versicherungsdienst
CID Kredietbank G.m.b.H.
CID Software G.m.b.H.
CISA Financial Services S.A.
Classic Chrysler Center, Inc.
CLG Media, Inc.
CLG Media of Jackson, Inc.
Clinton Holding Corporation
Compania Importadora, S.A.
Conemaugh Hydroelectric Projects, Inc.
Courtesy Dodge Chrysler (1998) Inc.
Cross Lane Properties, Inc.
Cross Road Chrysler Plymouth, Inc.
Dartmouth Dodge Chrysler (1991) Inc.

Dealer Capital, Inc.

Distribuidora Automotriz Interlomas, S.A. de C.V.

Dominion Chrysler Plymouth, Inc.

Dominion Chrysler-Plymouth, Inc.

Downriver Dodge, Inc.

East Tulsa Dodge, Inc.

Edmonda Dodge, Inc.

EFH Leasing Corporation

Electrical Wiring Component Application Partnership (EWCAP)

Emily FSC Ltd.

Ensambladora Carabobo, C.A.

Environmental Science Research Consortium

EPC Corporation

Eurostar Automobilwerk Ges. m.b.H.

Eurostar Automobilwerk Ges. m.b.H. & Co. KG

Fourfold Cogeneration Corporation

FPB California Cogeneration Corporation

Fresno Biomass Power Corporation

Fundacion Chrysler Mexico, IAP

Grupo Chrysler de Mexico

Hacogen Corporation

Halifax Chrysler Dodge (1989) Ltd.

Harper Lake IX, L.P.

Harper Lake Solar Partners IX Corporation

Hartford Turbine Cogeneration Corporation

HCCF Corporation

High Speed Serial Data Communications Research and Development Partnership

Hilltop Dodge Sales, Inc.

HLLSLC Corporation

HLSP IX, Inc.
Inmuebles Chrysler de Mexico, S.A. de C.V.
International Motors & Management, S.A.M.
Jasmin EOR Cogeneration Corporation
Jean Talon Plymouth Chrysler (1988) Ltee
Jeep Australia, Pty., Ltd.
Jeep Caracas, S.A.
Jeep of Canada Limited
Kingswood Chrysler-Plymouth, Inc.
Kirkland Chrysler Plymouth Jeep Eagle, Inc.
Klair, Ltd.
La Brea Avenue Motors, Inc.
Lauren 90 Corporation
Laurissa 85 Corporation
Lexington Park Motors
Low Emissions Paint Research and Development Partnership
Low Emissions Technologies Research and Development Partnership
Macon Chrysler Plymouth, Inc.
Marine Asset Management Corporation
Marine Plymouth Chrysler Ltd.
Marisa, Inc.
Mathilda FSC Ltd.
Michigan Materials and Processing Institute
Midfield Dodge, Inc.
Natural Gas Vehicle Technology Partnership
New Canaan Road Holdings, Inc.
New Venture Gear, Inc.
Niagara Turbine Cogeneration Corporation
OAM S.p.A

Ormesageo 1E Geothermal Corporation
Pasir Puteh Ltd.
Pentastar Insurance Agency, Inc.
Perth Ltd.
Porterville Chrysler Center, Inc.
Poso EOR Cogeneration Corporation
Premier Auto Receivables Company
Premier Receivables L.L.C.
Public Warehouse Europe BV
RAE Hotel Corporation
Rambler Motors (AMC) Limited
Redisco Canada Ltd.
Rocklin Biomass Power Corporation
Ross Park Dodge, Inc.
Royal Dodge, Inc.
South Gate Chrysler Plymouth Jeep Eagle, Inc.
South Trail Plymouth Chrysler Ltd.
Southland Chrysler Plymouth Jeep Eagle, Inc.
Southland Chrysler Products, Inc.
Sovereign Crest Properties Inc.
Stamford Holdings No. 2, Inc.
Stillwater Geothermal Corporation
Stoneridge Motors, Inc.
Suffolk Leasing, Inc.
Super Computer Automotive Applications Partnership
Team Chrysler Dodge, Inc.
Thai Chrysler Automotive Limited
Toquam Properties, Inc.
Tritec Motors Ltda.
Trona Cogeneration Corporation
TTC Corporation

U.S. Auto Receivables Company

UMB Properties, Inc.

Union City Chrysler-Plymouth, Inc.

United States Advanced Battery Consortium

United States Automotive Materials Partnership

United States Automotive Occupant Safety Research Partnership

Upper Darby Chrysler-Plymouth, Inc.

Vehicle Recycling Partnership

Webster Chrysler Center, Inc.

West Liberty Dodge, Inc.

Westover Holdings, Inc.

Whitewater Holdings, Inc.

Wilson Street Holdings, Inc.

Yonge and 7 Plymouth Chrysler Inc.

(2)

Supreme Court, U.S.
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JAN 26 1999
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No. 98-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DaimlerChrysler Corporation,

Petitioner,

v.

Kolosso Auto Sales, Inc.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the Respondent, Kolosso Auto Sales, Inc., states that it has no parent companies and no nonwholly owned subsidiaries.

TABLE OF CONTENTS

PAGE

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

CHRYSLER'S MISSTATEMENTS OF FACT OR LAW 6

REASONS FOR DENYING THE PETITION 9

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS 9

A. Chrysler Misstates the Seventh Circuit's Decision 9

B. The Seventh Circuit's Decision Correctly Applies this Court's Precedents 11

C. The Subject Regulation Is Justified As A Proper Exercise of the State's Police Power 13

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CREATE A SPLIT IN THE CIRCUITS OVER WHEN CONTRACTUAL IMPAIRMENTS ARE FORESEEABLE 17

A. The Seventh Circuit's Determination That The Contractual Impairment Here Was Foreseeable Is Justified By Wisconsin's Pervasive Regulation of the Motor Vehicle Franchise Agreements That Already Existed When The Parties' Franchise Agreement Was Formed 17

B. The Seventh Circuit's Decision Does Not Conflict With The Eighth Circuit's Decision In *Holiday Inn Franchising* 21

CONCLUSION 23

APPENDIX . . . . . R. App. 1

TABLE OF AUTHORITIES

Cases: PAGE(S)

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 11, 12

American Suzuki Motor Corp. v. Bill Kummer, Inc., 65 F.3d 1381 (7th Cir. 1995) 15

Bob Willow Motors, Inc. v. General Motors Corp., 872 F.2d 788 (7th Cir. 1989) 15, 19

Department of Transp. v. Transportation Comm'n, 111 Wis. 2d 80, 330 N.W.2d 159 (1983) 15, 19

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 9, 11, 22

Ford Motor Co. v. Lyons, 137 Wis. 2d 397, 405 N.W.2d 354 (Ct. App. 1987) 15

Forest Home Dodge, Inc. v. Karns, 29 Wis. 2d 78, 138 N.W.2d 214 (1965) . . . 1, 14, 15

General Motors Corp. v. Romein, 503 U.S. 181 (1992) 10

Holiday Inns Franchising v. Branstad, 29 F.3d 383 (8th Cir. 1994) 8, 21, 22, 23

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1986) 12, 16

Kuhl Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955) 16

McDonald's Corporation v. Nelson,
822 F. Supp. 597 (S.D. Iowa 1993),
aff'd 29 F.3d 383 21

Nagle Motors v. Volkswagen N.C. Distributor,
51 Wis. 2d 413, 187 N.W.2d 374
(1971) 15, 17, 18

New Motor Vehicle Board v. Orrin W. Fox Co.,
439 U.S. 96 (1978) 1, 13, 14, 16

Veix v. Sixth Ward Building & Loan Ass'n,
310 U.S. 32 (1940) 22

*Wipperfurth v. U-Haul Co. of Western
Wisconsin, Inc.*, 101 Wis. 2d 586,
304 N.W.2d 767 (1981) 21

Statutes:

Wis. Stat. § 218.01 1

Wis. Stat. § 218.01(2)(bd)2 (1985-86) 18

Wis. Stat. § 218.01(2)(bd)3 (1985-86) 2

Wis. Stat. § 218.01(2)(e) (1985-86) 6

Wis. Stat. § 218.01(2a) (1985-86) 7

Wis. Stat. § 218.01(3)(a)4, (9)(a) (1985-86) 19

Wis. Stat. § 218.01(3)(a)11 (1985-86) 3

Wis. Stat. § 218.01(3)(a)11, (9)(a) (1985-86) 18

Wis. Stat. § 218.01(3)(a)14 (1985-86) 3

Wis. Stat. § 218.01(3)(a)16 (1985-86) 2, 17

Wis. Stat. § 218.01(3)(a)17 (1985-86) 3, 7, 17, 18, 20

Wis. Stat. § 218.01(3)(a)23 (1985-86) 3, 5

Wis. Stat. § 218.01(3)(a)24 (1985-85) 3

Wis. Stat. § 218.01(3)(a)26 (1985-86) 3

Wis. Stat. § 218.01(3)(a)26m (1985-86) 4, 5, 7, 18, 19

Wis. Stat. § 218.01(3)(a)32, (3)(f)1 (1985-86) . . . 3, 7

Wis. Stat. § 218.01(3)(bf)1 (1985-86) 6

Wis. Stat. § 218.01(3)(h) (1985-86) 19

Wis. Stat. § 218.01(3x) . . . . . *passim*

Wis. Stat. § 218.01(3x)(b)1 . . . . . 4, 5

Wis. Stat. § 218.01(3x)(c) 15

Wis. Stat. § 218.01(5)(a) (1985-86) 2

Wis. Stat. § 218.01(9)(a) (1985-86) 19

STATEMENT OF THE CASE

Since 1937, Wisconsin has regulated the franchise agreements of motor vehicle manufacturers and their dealers under the Wisconsin Motor Vehicle Dealer Law ("WMVDL"), § 218.01, Wis. Stats. This regulation exists "in recognition of the gross disparity of bargaining power between the manufacturer of automobiles and the local retailer" and "the long history of the abuse of dealers by manufacturers." *Forest Home Dodge, Inc. v. Karns*, 29 Wis. 2d 78, 85, 138 N.W.2d 214, 217-18 (1965). *See also New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 100-01 (1978) ("[t]he disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers").

In 1988, the petitioner, DaimlerChrysler Corporation ("Chrysler"), a motor vehicle manufacturer licensed under the WMVDL, entered into franchise agreements (the "Franchise Agreement")[1] for Chrysler's Jeep and Eagle line makes of vehicles with the Respondent, Kolosso Auto Sales, Inc. ("Kolosso"), a licensed motor vehicle dealer in Appleton, Wisconsin. The Franchise Agreement was for an indefinite term. However, Chrysler reserved for itself the right to unilaterally amend the Franchise Agreement where "the passage of time, changes in the industry, ways of doing business

---

[1] Chrysler and Kolosso signed two separate Sales and Service Agreements, one for Jeep vehicles and the other for Eagle vehicles, which were otherwise identical. Both agreements are referred to in this brief as the "Franchise Agreement."

and other unforeseen circumstances" caused it to determine that it should.

The Franchise Agreement contained, among others, a provision that required Kolosso to obtain Chrysler's prior written approval before changing the location or the use of Kolosso's dealership facility. However, when Chrysler entered into the Franchise Agreement, it knew that, as a motor vehicle manufacturer licensed in Wisconsin, its franchise agreements with dealers such as Kolosso would be subject to extensive regulation by the State of Wisconsin under the WMVDL, including regulation of Chrysler's contractual right to approve the location and use of Kolosso's facilities.

This knowledge resulted from Chrysler's having obtained a license to act as a motor vehicle manufacturer license in Wisconsin, thereby subjecting itself "to all provisions of the Wisconsin statutes regulating manufacturers, importers and distributors." § 218.01(2)(bd)3 (1985-86).[2] As of 1988, these provisions included:

1. The power of the licensing agency to "define unfair practices in the motor vehicle industry and trade between licensees . . . ." § 218.01(5)(a) (1985-86).

2. The prohibition against "[b]eing a manufacturer . . . who has attempted to induce or coerce, or has induced or coerced, any automobile dealer to enter into any agreement with such manufacturer . . . or to do any other act unfair to said dealer, by threatening to cancel any franchise existing between such manufacturer . . . and said dealer" § 218.01(3)(a)16 (1985-86).

---

[2] Applicable provisions of the WMVDL in effect when the Franchise Agreement was entered into are reproduced in the Appendix to this brief.

3. The prohibition against "[b]eing a manufacturer . . . who has unfairly, without due regard to the equities of said dealer and without just provocation, canceled . . . the franchise of any motor vehicle dealer." § 218.01(3)(a)17 (1985-86).

4. The prohibition against "[h]aving indulged in any unconscionable practice relating to said business." § 218.01(3)(a)11 (1985-86).

5. The prohibition against "[h]aving violated any law relating to the sale, distribution or financing of motor vehicles." § 218.01(3)(a)14 (1985-86).

6. The prohibition against "[b]eing a manufacturer . . . who unreasonably withholds its approval of a change of ownership or executive management of a dealership," § 218.01(3)(a)23 (1985-86).

7. The prohibition against "[b]eing a manufacturer . . . who unreasonably closes a dealer point." § 218.01(3)(a)24 (1985-85).

8. Provisions regulating the rights of "designated family members" of a deceased or incapacitated dealer to succeed to the ownership and operation of the dealership under an existing franchise agreement. § 218.01(3)(a)26 (1985-86).

9. A procedure under which the licensing agency could prevent a manufacturer from *relocating* or establishing a dealer in another existing dealer's relevant market area upon a showing of "good cause" for not permitting the relocation or establishment. §§ 218.01(3)(a)32, (3)(f)1 (1985-86).

10. A prohibition against "[b]eing a manufacturer . . . who unreasonably refuses to allow a dealership to

share its facilities with another or who unreasonably refuses to allow a dealership to add another franchise at the same location as its existing franchise or franchises." § 218.01(3)(a)26m (1985-86).

In 1993, the Wisconsin Legislature amended the WMVDL to, among other things, create § 218.01(3x).[3] This subsection established an explicit procedure for resolving disputes regarding a manufacturer's refusal to allow a dealer to "change its ownership or executive management, transfer its dealership assets to another person, add another franchise at the same location as its existing franchise or relocate a franchise . . . ." § 218.01(3x)(b)1. The procedure in § 218.01(3x) permits the State of Wisconsin, acting through its agency, the Division of Hearings and Appeals ("Division"), to allow a dealer to undertake one or more of these proposed actions where, after considering the interests of the manufacturer, the dealer, other dealers and the public,[4]

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[3] Section 218.01(3x) is reproduced in Appendix E (App. 45a-48a) to the Petition.

[4] The factors specified in the statute to be considered by the Division in determining whether "good cause" exists are:

> a. The reasons for the proposed action.
>
> b. The [manufacturer's] reasons for not approving the proposed action.
>
> c. The degree to which the inability to undertake the proposed action will have a substantial and adverse effect upon the motor vehicle dealer's investment or return on investment.
>
> d. Whether the proposed action is in the public interest.

(continued...)

the Division determines that there is "good cause" to permit the proposed action. Until such a determination is obtained, the dealer is prohibited by the statute from undertaking any of the listed actions without the manufacturer's approval as required by the franchise agreement. § 218.01(3x)(b)1.

Section 218.01(3x) replaced the prohibitions against "[b]eing a manufacturer . . . who unreasonably withholds its approval of a change of ownership or executive management of a dealership," § 218.01(3)(a)23 (1985-86), and "[b]eing a manufacturer . . . who unreasonably refuses to allow a dealership to share its facilities with another or who unreasonably refuses to allow a dealership to add another franchise at the same location as its existing franchise or franchises." § 218.01(3)(a)26m (1985-86), which had been in effect prior to 1988. These changes were made applicable to franchise agreements that existed prior to their effective date, as well as to those entered into after the effective date.

Kolosso sought to invoke § 218.01(3x) in 1995, after Chrysler had rejected its request to allow Kolosso to relocate its Jeep-Eagle dealership "to another address in Appleton in order to enable it to consolidate the service facilities of its Chrysler dealership with the service

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[4] (...continued)

> e. The degree to which the proposed action will interfere with the orderly and profitable distribution of products by the [manufacturer].
>
> f. The impact of the proposed action on other motor vehicle dealers.

§ 218.01(3x)(c)1. a. - f.

facilities of a Toyota dealership that it owned at that address." App. 2a. After Kolosso filed a Complaint with the Division under § 218.01(3x) challenging Chrysler's disapproval of this proposed action, Chrysler commenced the underlying suit in the United States District Court for the Eastern District of Wisconsin. Chrysler's suit sought a declaratory judgment that the application of § 218.01(3x) to Kolosso's proposal violates the Contracts Clause of the United States Constitution. By agreement of the parties, the proceedings on Kolosso's Complaint under § 218.01(3x) have been stayed pending the completion of this action.

The District Court held that the application of § 218.01(3x) to Kolosso's proposal does not contravene the Contracts Clause. App. 12a-19a. Chrysler appealed that decision to the Seventh Circuit, which affirmed. App. 1a-11a.

CHRYSLER'S MISSTATEMENTS OF FACT OR LAW

Kolosso disputes several statements of fact or law made in the petition, including:

1. At page 1 of the petition, Chrysler states that, prior to the Wisconsin Legislature's enactment of § 218.01(3x) in 1993, "the State of Wisconsin had never regulated the location of automobile dealerships . . . ." This statement is contradicted by several provisions of the WMVDL which existed before 1988 when Chrysler signed the Franchise Agreement with Kolosso, including: §§ 218.01(2)(e), (3)(bf)1 (1985-86), which required licensed dealers to own a vehicle display lot and per-

manent facilities for display of vehicles and required that the location of such facilities be specified in the dealers' licenses issued by the licensor; § 218.01(2a) (1985-86), which required that, before changing its location, the dealer notify the licensor and apply for an amended license; §§ 218.01(3)(a)32, (3)(f) (1985-86), which prohibited manufacturers from relocating a motor vehicle dealership within the "relevant market area" of an existing enfranchised dealer of the same line make of vehicle without first notifying that dealer and providing it 30 days to protest the relocation with the licensing agency; § 218.01(3)(a)17, which prohibited a manufacturer from terminating a dealer's franchise for, among other things, relocating without the manufacturer's approval if the manufacturer's withholding of such approval was not "just and fair" enforcement of the franchise agreement;[5] and § 218.01(3x), which prohibited manufacturers from unreasonably refusing "to allow a dealership to share its facilities with another . . . ."[6]

2. At page 5 of the petition, Chrysler states that "Chrysler denied Kolosso's request, because Kolosso's original location was extremely advantageous for the sale of Jeep and Eagle vehicles." The reasons for Chrysler's denial of Kolosso's request have not yet been litigated or determined by any court or administrative agency. Kolosso contends that Chrysler's opposition to

---

[5] See further discussion below under Section II.A.

[6] See further discussion below under Section II.A. regarding why § 218.01(3)(a)26m (1985-86) would likely have been construed to apply to a proposal to change a dealership's location in order to share facilities with another dealership.

Kolosso's proposal has more to do with Kolosso's intention to share service facilities with Toyota and Chrysler's desire to force Kolosso to sell its Jeep-Eagle dealership to the local Chrysler-Plymouth dealer, than with any perceived advantages of Kolosso's existing location. App. 27a.

3. At several places in the petition, Chrysler contends that the Seventh Circuit has held that no "police power justification" is required for § 218.01(3x). This is a misstatement of the Seventh Circuit's analysis for the reasons set forth in Section I.A. below.

4. The petition also infers that there is no "police power justification" for § 218.01(3x). This is a misstatement of law and fact for the reasons set forth in Section I.C. below.

5. The petition states that the Seventh Circuit's decision creates a conflict in the circuits with the Eighth Circuit's decision in *Holiday Inns Franchising v. Branstad*, 29 F.3d 383 (8th Cir. 1994), over when contractual impairments are foreseeable. For the reasons set forth in Section II below, this statement is incorrect because the prior regulation of the franchise relationships involved in *Holiday Inns Franchising*, which was virtually nonexistent, was fundamentally different from the WMVDL's prior regulation of motor vehicle franchise agreements such as the agreement in this case.

REASONS FOR DENYING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS

A. Chrysler Misstates the Seventh Circuit's Decision

Chrysler argues that the Seventh Circuit's decision conflicts with this Court's precedents by holding that "*no* state police power justification is required, as long as a court can characterize the resulting burden as a 'small step.'" Petition at 13 (emphasis in original). It further argues that "[t]he Seventh Circuit acknowledged that the amended Dealer Act 'could not be "sustained as an exercise of the police power"' . . . ." *Id.*

The truth is that the Seventh Circuit's decision does not address the issues of whether a state police power justification is required for a statute retroactively applied to an existing contract and whether the statute retroactively applied here was in exercise of the State's police power. The phrase "police power" does not appear anywhere in the Seventh Circuit's decision. Instead, after concluding that the subject regulation was not a substantial impairment of Chrysler's preexisting contract rights, the Seventh Circuit merely restated what this Court has often held—that insubstantial or minor impairments of contract rights do not require "a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983).

In its analysis of the Seventh Circuit's decision, Chrysler confuses a State's exercise of its police power,

which is required for any state's economic regulation, whether prospective or retroactive, under the Fourteenth Amendment to the United States Constitution, *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992), with the special justification that must exist in order for the State to *substantially impair* an existing contract right under the Contracts Clause. In discussing justification for the subject regulation here, the Seventh Circuit was clearly addressing the latter form of justification, which it correctly held is not required in this case because the contract impairment is not substantial.[7]

---

[7] If justification beyond the requisite exercise of the State's police power were required in this case, it does exist. First, the Seventh Circuit's decision concludes that "the 1993 amendment in effect regularized a gray area in the dealership law." App. 9a. Clarification of the existing law is, in itself, sufficient justification for the insubstantial impairment that exists here. Second, the amendment deals with critical issues of motor vehicle facility locations and use, in which the public, in addition to dealers and manufacturers, has an important interest. The public has an obvious and substantial interest in the convenient location of motor vehicle dealer facilities and in the efficient use of those facilities, which may result from sharing of facilities by dealerships to avoid excess capacity and to achieve overhead cost savings that may be passed through to car buyers and owners as retail price reductions. For this reason, § 218.01(3x)(c)1.d specifies "[w]hether the proposed action is in the public interest" as one of the factors to be considered by the Division in determining whether there is "good cause" to allow a dealer relocation and facility sharing proposal to be undertaken.

B. The Seventh Circuit's Decision Correctly Applies this Court's Precedents

The Seventh Circuit's determination that no special justification, beyond the "police power" justification required for all State regulation of private contracts, is required for minor impairments of contract rights, is consistent with this Court's precedents.

In *Energy Reserves*, this Court stated that, in determining if a state regulation violates the Contract Clause, "[t]he threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" *Energy Reserves*, 459 U.S. at 411 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). It then is stated that "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Id.* at 411-12 (citation omitted).

In *Allied Structural Steel*, the threshold test was stated as follows:

> [T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. *Minimal alteration of contractual obligations may end the inquiry at its first stage.* Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Allied Structural Steel, 438 U.S. at 244-45 (emphasis supplied) (footnotes omitted).

Also, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1986), this Court indicated that inquiry into the justifications for the impairment is required only if a substantial impairment is found.

> We agree that the statute operates as "a substantial impairment of a contractual relationship," and therefore proceed to the asserted justifications for the impairment.

(Citation omitted.)

The Seventh Circuit's decision correctly applies this Court's precedents. Because the challenged regulation was found not to operate as a substantial impairment of a contractual relationship, the Seventh Circuit did not need to inquire into the justification for the impairment. The statement in the Seventh Circuit's decision that "little, predictable impairments . . . don't have to be justified at all," App. 9a, is nothing more than a paraphrase of this Court's statement that "[m]inimal alteration of contractual obligations may end the inquiry at its first stage." *Allied Structural Steel*, 438 U.S. at 245.

The Seventh Circuit did not hold, as Chrysler asserts, that the regulation did not need to be sustained as an exercise of the police power or that the regulation could not be so sustained. No argument that the regulation in question is beyond the scope of the State of Wisconsin's police power to regulate private contract relations was made to the Seventh Circuit or the District Court in this case. Under prior judicial precedents, which are discussed in the next section of this brief, it was implicitly assumed that the State's regulation of franchise relationships to protect the franchisee from abuse of the

franchisor's superior bargaining power is an appropriate exercise of the State's police power.

C. The Subject Regulation Is Justified As A Proper Exercise of the State's Police Power

The regulation challenged in this case is clearly a proper exercise of Wisconsin's police power under this Court's and other judicial precedent. Motor vehicle franchise regulation has been adopted by Congress and by many states, and the purpose of such regulation has been frequently articulated by the courts. For example, in holding that a California statute governing the establishment or relocation of new motor vehicle dealerships did not violate manufacturers' due process rights under the Fourteenth Amendment, this Court has observed that:

> The disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers.

New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 100-01 (1978).

In *Orrin W. Fox*, this Court supported its statement of the purpose underlying motor vehicle franchise legislation by quoting from a Congressional Committee report, which included the following passage:

> This vast disparity in economic power and bargaining strength has enabled the factory to determine arbitrarily the rules by which the two parties conduct their business affairs. These

> rules are incorporated in the sales agreement or franchise which the manufacturer has prepared for the dealer's signature.
>
> Dealers are with few exceptions completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory. On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable. The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer.

Id. at 100 n.4.

In *Orrin W. Fox*, this Court also cited the Wisconsin Supreme Court's decision in *Forest Home Dodge, Inc. v. Karns*, 29 Wis. 2d 78, 138 N.W.2d 214 (1965) "[f]or a helpful discussion of the purpose served by such laws—the promotion of fair dealing and the protection of small business." *Id.* at 102 n.7. In *Forest Home Dodge*, the state Supreme Court described the purpose of the WMVDL, in which the regulation challenged here is included, as follows:

> Implicit in this law is the recognition of the gross disparity of bargaining power between the

> manufacturer of automobiles and the local retailer. It was enacted in recognition of the long history of the abuse of dealers by manufacturers. *Kuhl Motor Co. v. Ford Motor Co.* (1955), 270 Wis. 488, 71 N.W.2d 420. These laws deal with the relationship between auto manufacturers and auto dealers. *The purpose of the law is to furnish the dealer with some protection against unfair treatment by the manufacturer.*

Forest Home Dodge, 29 Wis. 2d at 85, 138 N.W.2d at 217-18 (emphasis supplied).

This purpose underlying the WMVDL has been often repeated in state and federal court decisions that have applied the statute. *See American Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1389 (7th Cir. 1995); *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 794 (7th Cir. 1989); *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 433-34, 405 N.W.2d 354, 369 (Ct. App. 1987); *Department of Transp. v. Transportation Comm'n*, 111 Wis. 2d 80, 94-95, 330 N.W.2d 159, 165-66 (1983); *Nagle Motors, Inc. v. Volkswagen N.C. Distributor*, 51 Wis. 2d 413, 423, 187 N.W.2d 374, 381 (1971).

By enacting the challenged regulation in this case, the Wisconsin Legislature has chosen to protect Wisconsin motor vehicle dealers from unfair treatment with respect to dealer relocation and facility sharing proposals by allowing dealers, who are denied manufacturer approval, to seek an order from the Division allowing their proposals to be implemented, if a determination is made that there is "good cause" for the change. § 218.01(3x)(c). The "courts should 'properly defer to

[the Legislature's] judgment as to the necessity and reasonableness of [this] particular measure.'" *Keystone Bituminous Coal*, 480 U.S. at 505 (quoted source omitted).

The regulation of contract relationships to protect the party with unequal bargaining power has so often been held to fall within the exercise of the states' police powers that the issue is no longer debatable. In rejecting the manufacturer's due process attack on the California statute in *Orrin W. Fox*, this Court held:

> [T]he California Legislature was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices.

Id. at 107.

Similarly, in *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 502, 71 N.W.2d 420, 427 (1955), the Wisconsin Supreme Court held with respect to the WMVDL:

> It would seem reasonably clear that one of the chief objectives of the legislature in enacting sec. 218.01, Stats., insofar as it seeks to regulate the dealings between automobile manufacturers and dealers, is to promote fair dealing, which, of course, is a legitimate exercise of police power.

Because the challenged regulation here was clearly justified by the exercise of the State's police power and because Chrysler never argued otherwise in the courts below, Chrysler's argument that this case should be heard because there is no state police power justification for the regulation must be rejected.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CREATE A SPLIT IN THE CIRCUITS OVER WHEN CONTRACTUAL IMPAIRMENTS ARE FORESEEABLE

A. The Seventh Circuit's Determination That The Contractual Impairment Here Was Foreseeable Is Justified By Wisconsin's Pervasive Regulation of the Motor Vehicle Franchise Agreements That Already Existed When The Parties' Franchise Agreement Was Formed

The Seventh Circuit's decision correctly concluded that § 218.01(3x) does not substantially impair Chrysler's contractual right to approve the location and use of Kolosso's facility because, in view of the pervasive regulation of motor vehicle franchise agreements by the WMVDL when the Franchise Agreement was entered into, it was foreseeable that a regulation similar to § 218.01(3x) might someday be enacted.

In 1988, when the Franchise Agreement was signed, Chrysler already was prohibited by § 218.01(3)(a)17 (1985-86) of the WMVDL from terminating that agreement without "just provocation" and "due regard to the equities" of the dealer, which the Wisconsin Supreme Court had construed to require manufacturers to be "just and fair in enforcing the terms of the contract" and to make Wisconsin dealers "immune from unreasonable contract terms or the arbitrary, capricious, vengeful enforcement of those terms." *Nagle Motors*, 51 Wis. 2d at 431, 187 N.W.2d at 385. The law also prohibited Chrysler from inducing or coercing a dealer to do any "act unfair to said dealer, by threatening to cancel any franchise existing between such manufacturer, . . . and said dealer." § 218.01(3)(a)16 (1985-86). Other provisions of the statute gave Kolosso a cause of

action if Chrysler "indulged in any unconscionable practice" or engaged in an "unfair practice." §§ 218.01(3)(a)11, (9)(a) (1985-86).

As noted in the Seventh Circuit's decision, at the time the Franchise Agreement was signed, Chrysler's contractual right to approve the location and use of Kolosso's facility was already restricted by these provisions. App. 7a-8a. Under the law existing then and until the 1993 amendment to the WMVDL, if Chrysler refused to approve Kolosso's proposal to relocate its Jeep-Eagle dealership in order to share facilities with its Toyota dealership, Kolosso could have obtained review of Chrysler's disapproval by the licensing agency through, among other means, relocating and sharing facilities without Chrysler's approval and then defending against the termination of its franchise on the basis that Chrysler had not been "just and fair" in enforcing the contract. §§ 218.01(2)(bd)2, (3)(a)17 (1985-86); *Nagle Motors*, 51 Wis. 2d at 431, 187 N.W.2d at 385.

Also, the WMVDL contained a prohibition against "[b]eing a manufacturer, . . . who unreasonably refuses to allow a dealership to share its facilities with another or who unreasonably refuses to allow a dealership to add another franchise at the same location as its existing franchise or franchises." § 218.01(3)(a)26m (1985-86). Prior to its repeal in 1993, when it was replaced by § 218.01(3x), there was no judicial or administrative determination as to whether § 218.01(3)(a)26m applied to a proposal, such as Kolosso's, where the dealership needed to be relocated in order "to share its facilities with another." However, the Wisconsin Supreme Court has held that the provisions of the WMVDL are to be liberally construed to promote the statutory purpose of

protecting dealers against unfair treatment by manufacturers. *See Department of Transp.*, 111 Wis. 2d at 95, 330 N.W.2d at 166. *See also Bob Willow Motors*, 872 F.2d at 793. In order for two dealerships to begin sharing their facilities, at least one of them would have to relocate. Therefore, a construction of § 218.01(3)(a)26m that limited it to facility sharing proposals *not* involving a dealership relocation would have rendered that statute meaningless.

Accordingly, it is likely that § 218.01(3)(a)26m (1985-86) would have been found to apply to Kolosso's proposal to relocate its Jeep-Eagle dealership in order to share facilities. Prior to 1993, if Chrysler unreasonably refused to allow Kolosso's request to share its Jeep-Eagle dealership facilities with those of its Toyota dealership in violation of § 218.01(3)(a)26m (1985-86), Kolosso could have sought to enjoin the violation pursuant to § 218.01(3)(h) (1985-86) or treble damages under §§ 218.01(3)(a)4, (9)(a), if the violation was "wilful."[8]

The 1993 amendment to the WMVDL merely modified Kolosso's remedies in the event Chrysler refused to approve a Kolosso proposal to relocate and share its facilities. Instead of Kolosso being able to sue Chrysler for treble damages caused by Chrysler's unreasonable refusal to allow Kolosso to share its facilities or Kolosso being able to relocate and share its facilities without Chrysler's approval and to defend a subsequent fran-

---

[8] Section 218.01(9)(a) (1985-86) allowed dealer licensees to recover three times the damages caused by a manufacturer licensee's violation of § 218.01(3)(a)4 (1985-86), which prohibited any "[w]ilful failure to comply with any provision of [§ 218.01] . . . ."

chise termination based on § 218.01(3)(a)17, the amendment requires Kolosso to remain at its existing location while it pursues a determination from the Division under § 218.01(3x) that there is "good cause" to allow Kolosso to undertake its proposal. In many respects, Chrysler benefits from the amendment because it is not exposed to the risk of treble damages or of Kolosso relocating and sharing facilities without Chrysler approval prior to a determination by the Division allowing it to do so, based on consideration of Chrysler's, as well as Kolosso's and the public's, interests.

The Seventh Circuit's decision correctly concluded, therefore, that "the 1993 amendment in effect regularized a gray area in the dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate" and that such change was not "major," but "was rather the sort of fine tuning of the statute that Chrysler would have expected to take place from time to time because the statute regulates in such detail a complex commercial relationship." App. 8a, 9a.

Kolosso agrees with Chrysler that for a retail business "location is critical to success." Petition at 1. This is particularly so where, as here, one location will allow a dealership to share its facilities with another dealership and another location will not. The importance of dealership location, coupled with the Wisconsin Legislature's clear purpose of promoting fair dealing by manufacturers with respect dealer-initiated changes, including facility sharing proposals, made it foreseeable, when the Franchise Agreement was signed, that Chrysler's contractual right to approve the location and use of Kolosso's dealership facility could become subject to a regulation such as § 218.01(3x).

B. The Seventh Circuit's Decision Does Not Conflict With The Eighth Circuit's Decision In *Holiday Inn Franchising*

Notwithstanding the Wisconsin Legislature's previous effort to make a newly-enacted franchise protection law retroactive to preexisting dealerships, *see Wipperfurth v. U-Haul Co. of Western Wisconsin, Inc.*, 101 Wis. 2d 586, 304 N.W.2d 767 (1981), Chrysler contends that the failure of the Wisconsin Legislature to make other franchise regulations expressly retroactive rendered the challenged regulation unforeseeable and that the Seventh Circuit's refusal to so find conflicts with the Eight Circuit's decision in *Holiday Inns Franchising v. Branstad*, 29 F.3d 383 (8th Cir. 1994). App. 1a.

Chrysler fails to note that, in *Holiday Inns Franchising*, Iowa's regulation of the subject industries "prior to the Iowa Franchise Act focused mainly on the delivery of services to the customer, including health and safety concerns . . . and discrimination against employees or customers" and that "[t]he Act, which focuses on the business relationships between franchisors and franchisees, is much different from the type of regulation existing at the time the Act became effective." *McDonald's Corporation v. Nelson*, 822 F. Supp. 597, 606 (S.D. Iowa 1993), affirmed 29 F.3d 383. In discussing previous state franchise legislation in Iowa, the Eighth Circuit was addressing statutes regulating "other franchise arrangements," 29 F.3d at 385, not prior regulation of the same franchise relationships regulated by the statute being challenged in that case.

In *Holiday Inns Franchising*, regulation of the subject franchise relationships prior to the enactment of the subject regulation had been virtually nonexistent. 822

F. Supp. at 607. In this case, prior to the enactment of § 218.01(3x), Wisconsin's regulation of the Franchise Agreement had been pervasive and included the very issues of dealership location and facility sharing that are the subject of the challenged regulation. Where a new body of regulation is created for franchise relationships which have never been previously regulated, it may be reasonable for the franchisors to argue that they could not foresee the regulation coming and that, therefore, the imposition of such regulation to their existing franchise agreements is a "substantial impairment" of those agreements requiring further scrutiny of the State's justification for the regulation. *Energy Reserves*, 459 U.S. at 411. However, where the subject franchise relationship is already regulated, not only generally, but "in the particular to which [the franchisor] now objects," the franchisor cannot reasonably contend that "further legislation upon the same topic" was not foreseeable. *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 38 (1940).

Here, the Seventh Circuit correctly concluded, in view of the existing provisions of the WMVDL when the Franchise Agreement was signed, that the regulation in question was "the sort of fine tuning of the [existing motor vehicle franchise] statute that Chrysler would have expected to take place from time to time because the statute regulates in such detail a complex commercial relationship." App. 9a. This conclusion does not conflict with the Eighth Circuit's decision in *Holiday Inns Franchising*, which dealt with franchise arrangements that had not been previously regulated by the State. The issue before the Eighth Circuit was whether Iowa's and other states' regulation of *other* franchise

arrangements made the new regulation of previously unregulated arrangements foreseeable. Because the histories of the past regulation of the franchise relationships involved in the Seventh Circuit's decision and in the Eighth Circuit's decision in *Holiday Inns Franchising* were fundamentally different, there is no split in the circuits created by these decisions over when contractual impairments are foreseeable.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

WISCONSIN STATUTES (1985-86)

218.01 Motor vehicle dealers; salesmen; sales finance companies, licenses; fees; regulations; coercion; subsidies; penalties.

(1) DEFINITIONS. In this section, unless the context otherwise requires, the following words and terms shall have the following meanings:

(a) "Agreement" means contract or franchise or any other terminology used to describe the contractual relationship between manufacturers, distributors, importers and dealers.

. . .

(d) "Department" means the department of transportation.

. . .

(k) "Licensor" means the body, either the commissioner or the department or both, issuing a license hereunder.

(l) "Manufacturer" means any person, resident or nonresident who manufactures or assembles motor vehicles or who manufactures or installs on previously assembled truck chassis, special bodies or equipment which when installed form an integral part of the motor vehicle and which constitutes a major manufacturing alteration and which completed unit is owned by such manufacturer.

. . .

(n) "Motor vehicle dealer" means any person, firm or corporation, not excluded by par. (o) who:

1. For commission, money or other thing of value, sells, exchanges, buys, rents with the option of purchase, offers or attempts to negotiate a sale or exchange of an interest in motor vehicles; or,

2. Is engaged wholly or in part in the business of selling motor vehicles, including motorcycles, whether or not such motor vehicles are owned by such person, firm or corporation.

. . .

(1a) AUTHORITY OF DEPARTMENT AND COMMISSIONER. The department shall issue the licenses provided for in sub. (2) (d) 1 to 6 and have supervision over the licensees thereunder in respect to all the provisions of this section, except only as to such matters as relate to the sale of motor vehicles on retail instalment contracts and the financing and servicing of such contracts, over which matter the commissioner shall have jurisdiction and control, and the commissioner shall issue the licenses to sales finance companies. Either licensor hereunder shall, upon request, furnish the other licensor with any information it may have in respect to any licensee or applicant for license or any transaction in which such licensee or applicant may be a party or be interested. No license shall be issued under sub. (2) (d) 1 and 8 until both licensors have approved the application. The suspension or revocation of either of such licenses shall automatically likewise suspend or revoke the other license; and such suspension or revocation shall be certified by the licensor ordering it to the other licensor.

. . .

(2) LICENSES, HOW GRANTED; AGREEMENTS, FILING. (a) No motor vehicle dealer, motor vehicle salesman or sales finance company shall engage in business as such in this state without a license therefor as provided in this section. If any motor vehicle dealer acts as a motor vehicle salesman he shall secure a motor vehicle salesman's license in addition to a license for motor vehicle dealer. Every motor vehicle dealer shall be responsible for the licensing of every motor vehicle salesman in his employ.

(am) No manufacturer of motor vehicles, or factory branch, or distributor or distributor branch shall engage in business as such in this state without a license therefor as provided in this section.

. . .

(bd)2. Any dealer or distributor discontinued or canceled may within such 60-day notice period, file with the department and office of the commissioner of transportation and serve upon the respondent a complaint for a determination of unfair discontinuation or cancellation under sub. (3) (a) 17. Allowing opportunity for an answer, the office of the commissioner of transportation shall thereafter schedule a hearing on and decide the matter. Agreements and certificates of appointment shall continue in effect until final determination of the issues raised in such complaint. If the complainant prevails he or she shall have a cause of action against the defendant for reasonable expenses and attorney's fees incurred by him or her in such matter.

3. No manufacturers', distributors' or importers' vehicles shall be sold in this state unless either the

manufacturer on direct dealerships of domestic vehicles, the importer of foreign manufactured vehicles on direct dealerships or the distributor on indirect dealerships of either domestic or foreign vehicles are licensed under s. 218.01. The obtaining of a license under s. 218.01 shall conclusively establish that such manufacturer, distributor or importer is doing business in this state and shall subject the licensee to all provisions of the Wisconsin statutes regulating manufacturers, importers and distributors.

. . .

(c)2. a. In cases where a complaint of unfair cancellation of a dealer agreement is in the process of being heard, no replacement application for the agreement may be considered until a decision is rendered by the office of the commissioner of transportation.

b. In cases where a complaint has been filed under sub. (3) (f) protesting the proposed establishment or relocation of a dealership in a relevant market area, no license may be issued until the office of the commissioner of transportation has rendered a decision permitting the issuance of the license.

(d) The license fee for each calendar year, or part thereof, shall be:

1. For motor vehicle dealers, $20 for each office or branch thereof, plus $1 for a supplemental license for each used motor vehicle lot within the same municipality, but not immediately adjacent to the office or to a branch.

2. For motor vehicle manufacturers, $20; and for each factory branch in this state, $20.

. . .

(e) The licenses of dealers, manufacturers, factory branches, distributors, distributor branches and sales finance companies shall specify the location of the office or branch and must be conspicuously displayed there. In case such location be changed, the licensor shall indorse the change of location on the license without charge if it be within the same municipality. A change of location to another municipality shall require a new license, except for sales finance companies.

. . .

(2a) CHANGES IN PLACES OF BUSINESS TO BE REPORTED. (a) Before changing the location of a place of business or opening a new place of business in a municipality in which authorized to do business, a licensed dealer, distributor, or manufacturer shall apply to the department for an amended license. The department shall issue such license without charge.

. . .

(3) LICENSES, HOW DENIED, SUSPENDED OR REVOKED. (a) A license may be denied, suspended or revoked on the following grounds:

. . .

4. Wilful failure to comply with any provision of this section or any rule or regulation promulgated by the licensor under this section.

. . .

11. Having indulged in any unconscionable practice relating to said business.

. . .

14. Having violated any law relating to the sale, distribution or financing of motor vehicles.

15. Being a manufacturer of motor vehicles, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has induced or coerced or attempted to induce or coerce any motor vehicle dealer to accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodities which shall not have been ordered by said dealer.

16. Being a manufacturer of motor vehicles, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has attempted to induce or coerce, or has induced or coerced, any motor vehicle dealer to enter into any agreement with such manufacturer, factory branch or representative thereof, or to do any other act unfair to said dealer, by threatening to cancel any franchise existing between such manufacturer, factory branch or representative thereof and said dealer.

17. Being a manufacturer, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has unfairly, without due regard to the equities of said dealer and without just provocation, canceled or failed to renew the franchise of any motor vehicle dealer, or being a manufacturer, factory branch or importer, who unfairly, without due regard to the equities of a distributor and without just provocation, canceled or failed to renew the franchise of any

distributor. All existing dealers' franchises shall continue in full force and operation under a newly appointed distributor on the termination of an existing distributor unless a mutual agreement of cancellation is filed with the department between the newly appointed distributor and such dealer.

. . .

23. Being a manufacturer, factory branch or distributor who unreasonably withholds its approval of a change of ownership or executive management of a dealership.

24. Being a manufacturer, factory branch or distributor who unreasonably closes a dealer point.

. . .

26. Being a manufacturer, factory branch, distributor, field representative, officer, agent or any representative of such manufacturer, factory branch or distributor who, notwithstanding the terms of any agreement, refuses to honor the succession to the ownership or operation of a dealership under an existing franchise agreement by a designated family member of a deceased or incapacitated dealer, except in the manner prescribed by sub. (3c), or who unreasonably withholds its approval of a change of ownership or executive management of the dealership after the dealer's death or incapacity.

26m. Being a manufacturer, factory branch or distributor who unreasonably refuses to allow a dealership to share its facilities with another or who unreasonably refuses to allow a dealership to add another franchise at the same location as its existing franchise or franchises.

. . .

32. Being a manufacturer, factory branch or distributor who enters into a franchise agreement establishing or relocating a motor vehicle dealership in a relevant market area without first complying with the procedure in par. (f) 1.

. . .

(bf) 1. The department shall not license as a dealer an applicant for the sale of motor vehicles at retail unless such applicant owns or leases a vehicle display lot and a permanent building wherein there are facilities to display automobiles and motorcycles and facilities to repair functional and nonfunctional parts of motor vehicles and where replacement parts, repair tools and equipment to service motor vehicles are kept, and at which place of business shall be kept and maintained the books, records and files necessary to conduct the business. A residence, tent or temporary stand is not a sufficiently permanent place of business within the meaning of this paragraph.

. . .

(f) 1. A manufacturer, factory branch or distributor who seeks to enter into a franchise agreement establishing or relocating a motor vehicle dealership within the relevant market area of an existing enfranchised dealer of the line make of motor vehicle shall first notify in writing the department and each such existing enfranchised dealer of its intention to establish or relocate a dealership. Within 30 days of receiving the notice or within 30 days after the end of any appeal procedure provided by the manufacturer, factory branch or distributor, whichever is later, any existing enfran-

chised dealer of the same line make to whom the manufacturer, factory branch or distributor is required to give notice under this subdivision may file with the department and the office of the commissioner of transportation a complaint protesting the proposed establishment or relocation of the dealership within the relevant market area of the existing enfranchised dealer. If a complaint is filed, the department shall inform the manufacturer, factory branch or distributor that a timely complaint has been filed, that a hearing is required, and that the proposed franchise agreement may not be entered into until the office of the commissioner of transportation has held a hearing, nor thereafter, if the office of the commissioner of transportation determines that there is good cause for not permitting the proposed establishment or relocation of the dealership. In the event of multiple complaints, hearings shall be consolidated to expedite the disposition of the issue.

2. In determining whether good cause exists for not permitting the proposed establishment or relocation of a dealership, the office of the commissioner of transportation shall take into consideration the existing circumstances, including, but not limited to:

a. The amount of business transacted by existing enfranchised dealers of the line make of motor vehicle when compared with the amount of business available to them.

b. The permanency of the investment necessarily made and the obligations incurred by existing enfranchised dealers in the performance of their franchise agreements.

c. The effect on the retail motor vehicle business in the relevant market area.

d. Whether it is injurious to the public welfare for the proposed dealership to be established or relocated.

e. Whether the establishment or relocation of the proposed dealership would increase competition and therefore be in the public interest.

f. Whether the existing enfranchised dealers of the line make of motor vehicle are providing adequate consumer care for the motor vehicles of that line make, including the adequacy of motor vehicle service facilities, equipment, supply of parts and qualified personnel.

g. Whether the existing enfranchised dealers of the line make of motor vehicle are receiving vehicles and parts in quantities promised by the manufacturer, factory branch or distributor and on which promised quantities existing enfranchised dealers based their investment and scope of operations.

h. The effect the denial of such establishment or relocation would have on the license applicant or dealer who is seeking to establish or relocate a dealership.

3. The decision of the office of the commissioner of transportation shall be in writing and shall contain findings of fact and a determination of whether there is good cause for not permitting the proposed establishment or relocation of the dealership. The office of the commissioner of transportation shall deliver copies of the decision to the parties personally or by registered mail. The decision is final upon its delivery or mailing and no reconsideration or rehearing by the office of the commissioner of transportation is permitted.

4. For purposes of this paragraph:

a. The reopening of a dealership, which has been closed for less than 2 years, at the original location is not the establishment or relocation of a motor vehicle dealership. The reopening of a dealership at a location other than the original location is the establishment or relocation of a motor vehicle dealership if the new location is within 6 miles, by the closest highway route, of another enfranchised dealer of the same line make and is closer to such dealer than the reopening dealer's closed dealership.

b. The relocation of an enfranchised dealership to a location within the existing area of sales responsibility assigned to that enfranchised dealership by the manufacturer, factory branch or distributor is not the relocation of a dealership, unless the relocation site is within 6 miles, by the closest highway route, of the location of another enfranchised dealer of the same line make and is closer to such dealer than the relocating dealer's existing location.

. . .

(h) In addition to the licensor's authority to deny, suspend or revoke a license under this section, the commissioner, after public hearing, may issue a special order enjoining any licensee from engaging in any act or practice which is determined by the commissioner to be in violation of any provision of par. (a), and the office of the commissioner of transportation may be petitioned to issue such a special order after notice and hearing thereon.

. . .

(3c) FAMILY MEMBER'S RIGHT TO SUCCEED DECEASED OR INCAPACITATED DEALER UNDER EXISTING FRANCHISE

AGREEMENT. (a) The term "designated family member", as used in this subsection and in sub. (3) (a) 26, means the spouse, child, grandchild, parent, brother or sister of a dealer who, in the case of a deceased dealer, is entitled to inherit the dealer's ownership interest in the dealership under the terms of the dealer's will or under the laws of intestate succession of this state, or who, in the case of an incapacitated dealer, has been appointed by a court as the legal representative of the dealer's property. The term "designated family member" shall also mean and include the duly appointed and qualified personal representative and the testamentary trustee of a deceased dealer.

(b) Any designated family member of a deceased or incapacitated dealer shall have the right to succeed such dealer in the ownership or operation of the dealership under the existing franchise agreement provided the designated family member gives the manufacturer, factory branch or distributor written notice of his or her intention to do so within 120 days of the dealer's death or incapacity and unless there exists good cause for refusal to honor such succession on the part of the manufacturer, factory branch or distributor. The manufacturer, factory branch or distributor may request, and the designated family member shall provide, such personal and financial data as is reasonably necessary to determine whether the succession should be honored.

(c) If a manufacturer, factory branch or distributor believes it has good cause for refusing to honor the succession to the ownership and operation of a dealership by a family member of a deceased or incapacitated dealer under the existing franchise agreement, such

manufacturer, factory branch or distributor may, within 30 days of receipt of notice of the designated family member's intent to succeed the dealer in the ownership and operation of the dealership, serve upon such designated family member and the department notice of its refusal to honor the succession and of its intent to discontinue the existing franchise agreement with the dealership no sooner than 60 days from the date such notice is served. Such notice shall state the specific grounds for the refusal to honor the succession and the discontinuance of the franchise agreement. If no notice of such refusal and discontinuance is timely served upon the family member and department, or if the office of the commissioner of transportation rules in favor of the complainant in a hearing held under par. (d), the franchise agreement shall continue in effect subject to termination only in the manner prescribed in this subchapter.

(d) Any designated family member who receives a notice of the manufacturer's, factory branch's or distributor's refusal to honor his or her succession to the ownership and operation of the dealership may within the 60-day notice period, serve on the respondent and file in triplicate with the office of the commissioner of transportation a verified complaint for a hearing and determination by the office of the commissioner of transportation on whether good cause exists for such refusal and discontinuance. The office of the commissioner of transportation shall forward a copy of the complaint to the department. The manufacturer, factory branch or distributor shall have the burden of establishing good cause for such refusal by showing that the succession would be detrimental to the public interest

or to the representation of the manufacturer, factory branch or distributor. The franchise agreement shall continue in effect until the final determination of the issues raised in such complaint. If the complainant prevails he or she shall have a cause of action against the defendant for reasonable expenses and attorney's fees incurred in such matter. If the manufacturer, factory branch or distributor prevails, the office of the commissioner of transportation shall include in its order approving the termination of the franchise agreement such conditions as are reasonable and adequate to afford the complainant an opportunity to receive fair and reasonable compensation for the value of the dealership.

(e) Nothing in this subsection shall prevent a dealer, during the dealer's lifetime, from designating any person as his or her successor dealer by written instrument filed with the manufacturer, factory branch or distributor.

. . .

(5) RULES AND REGULATIONS. (a) The licensor shall promote the interests of retail buyers of motor vehicles relating to default, delinquency, repossession or collection charges and the refund of the finance charge and insurance premium on prepayment of the instalment contract. It may define unfair practices in the motor vehicle industry and trade between licensees or between any licensees and retail buyers of motor vehicles, but may not limit the price at which licensees may sell, assign or transfer receivables, contracts or other evidence of any obligation arising out of an instalment sale made under this section.

(c) The licensor may make such rules and regulations as it shall deem necessary or proper for the effective administration and enforcement of this section, but no licensee shall be subject to examination or audit by the licensor except as provided in sub. (3) (d).

. . .

(9) CIVIL DAMAGES. (a) Any licensee suffering pecuniary loss because of a violation by any other licensee of sub. (3) (a) 4, 11, 15, 16, 17, 23, 24, 26, 32 or 35 or because of any unfair practice found by the commissioner or office of the commissioner of transportation under sub. (5) (a) may recover damages therefor in any court of competent jurisdiction in an amount equal to 3 times the pecuniary loss together with costs including a reasonable attorney fee.

(3)

Supreme Court, U.S.
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No. 98-986

In The

Supreme Court of the United States

October Term, 1998

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

KOLOSSO AUTO SALES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF *AMICUS CURIAE* THE STATE OF WISCONSIN

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22 pp

TABLE OF CONTENTS

Page

STATEMENT 1

A. **Degree of Impairment Resulting from the State's Enactment of a Law Which "regularized a gray area in the [prior] dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate." Pet-Ap. 9a.** 2

B. **Kolosso's Relocation Request.** 7

C. **The District Court Action.** 7

D. **The Seventh Circuit's Decision.** 8

REASONS FOR DENYING THE PETITION 8

I. **EVEN IF THE SEVENTH CIRCUIT'S DECISION is READ AS HOLDING "THAT A STATE MAY FREELY IMPAIR A CONTRACT WITH *NO* PUBLIC JUSTIFICATION, SO LONG AS THE IMPAIRMENT IS 'SMALL,'" PET. AT (I), THAT HOLDING WOULD BE CONSISENT WITH THIS COURT'S INTERPRETATION OF THE CONTRACT CLAUSE.** 9

II. THE FIRST QUESTION PRESENTED BY THE PETITION IS NOT FRAMED BY THE SEVENTH CIRCUIT'S DECISION. 12

III. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS. MOREOVER, PETITIONER'S PERCEPTION OF THE IMPACT OF THE DECISION IS EXAGGERATED. 17

CONCLUSION 19

CASES

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234 (1978) 9, 11

Energy Reserves Group, Inc. v. Kansas Power & Light Co.,
459 U.S. 400 (1983) 10, 11

Forest Home Dodge, Inc., v. Karns,
29 Wis. 2d 78, 138 N.W.2d 214 (1965) 15

Holiday Inns Franchising, Inc. v. Branstad,
29 F.3d 383 (8th Cir. 1994) 17, 18

Kuhl Motor Co. v. Ford Motor Co.,
270 Wis. 488, 71 N.W.2d 420 (1955), ... 13

McDonald's Corp. v. Nelson,
822 F. Supp. 597 (S.D. Iowa 1993) 17

Nagle Motors v. Volkswagen N. C. Distributor,
51 Wis. 2d 413, 187 N.W.2d 374 (1971) 13

New Motor Vehicle Bd. of Cal. V. Orrin W. Fox Co.,
439 U.S. 96 (1978) 15

United States Trust Co. of New York v. New Jersey,
431 U.S. 1 (1977) 10

Wipperfurth v. U-Haul Co. of Western Wis., Inc.,
101 Wis. 2d 586, 304 N.W.2d 767 (1981) 6, 18

WISCONSIN STATUTES

Wis. Stat. § 15.03 5
Wis. Stat. § 15.103(1) 5
Wis. Stat. § 218.01 (1937) 13
Wis. Stat. § 218.01(3)(a)17 ..... 3, 13
Wis. Stat. § 218.01(3)(a)17. (1987-88) 3
Wis. Stat. § 218.01(3)(a)23. (1987-88) 4
Wis. Stat. § 218.01(3)(a)26m. (1987-88) 3, 4
Wis. Stat. § 218.01(3x) ..... passim
Wis. Stat. § 218.01(3x)(b)1 ..... 4, 6
Wis. Stat. § 218.01(3x)(b)2 ..... 4, 5
Wis. Stat. § 218.01(3x)(b)3 ..... 5, 6
Wis. Stat. § 218.01(3x)(c)1.b. 6
Wis. Stat. § 218.01(3x)(c)1.e. 6
Wis. Stat. § 218.01(3x)(c)1.f 6
Wis. Stat. § 218.01(3x)(c)2 5
Wis. Stat. § 218.01(3x)(d) 5
Wis. Stat. § 218.01(9) 4
Wis. Stat. ch. 135 6

OTHER AUTHORITIES

1993 Wisconsin Act 13, sec. 48 4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF *AMICUS CURIAE* THE STATE OF WISCONSIN

Amicus curiae the State of Wisconsin submits this brief in opposition to the petition for a writ of certiorari filed by petitioner DaimlerChrysler Corporation (herein, Chrysler).

STATEMENT

Although petitioner challenged the constitutionality of a statute of the State of Wisconsin (Wis. Stat. § 218.01(3x), applied to existing motor vehicle dealership contracts), neither the state nor any agency or official of the

state was made a party to the district court proceedings. However, the State of Wisconsin appeared as *amicus curiae* in both the district court and the court of appeals.

The state would make the following additions and corrections to Chrysler's statement of the case.

A. Degree of Impairment Resulting from the State's Enactment of a Law Which "regularized a gray area in the [prior] dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate." Pet-Ap. 9a.

The record did not establish that the terms of the dealership agreement concerning the location of respondent's ("Kolosso's") dealership were "[i]n recognition of Chrysler's overriding economic interest in the location of its franchise dealerships," as suggested by petitioner. Pet. at 3. The dealership agreement appeared to be a standard form agreement. It ostensibly did not have a termination date and ostensibly granted Chrysler the unilateral right to modify its terms. The record did not establish how any particular term of the agreement would have been interpreted or enforced by Wisconsin courts, in the absence of the challenged statutory provision. Nevertheless, the court of appeals concluded that the application of Wis. Stat. § 218.01(3x) to existing dealership agreements represented "a real change," Pet-Ap. 9a, which "changed the dealership contract to Chrysler's disadvantage." *Id.* at 5a. The court stated it had "no reason to doubt Chrysler's claim that the change hurt it," *id.* at 9a, perceiving the "[t]he result [to] be an added expense to Chrysler--either the loss of car sales by reason of the relocation or the expense of paying Kolosso not to move." *Id.* at 5a.

Contrary to Chrysler's statement in the petition, it is not correct that "[a]t the time that Chrysler executed its franchise agreement with Kolosso, Wisconsin had no statutes

or regulations governing whether or where automobile dealers could relocate." *See* Pet. at 3. As the court of appeals recognized, Wisconsin's long-standing regulation of motor vehicle dealer contracts included a prohibition against the termination of a dealership "unfairly, without due regard to the equities or without just provocation." *See* Pet-Ap. 7a, quoting Wis. Stat. § 218.01(3)(a)17. Accordingly, if, prior to the enactment of Wis. Stat. § 218.01(3x), a manufacturer sought to terminate (or enjoin) a dealer attempting to relocate without prior approval, its actions would be subject to existing regulation. *See id.* 8a. Moreover, the law at the time of Kolosso's contracting with Chrysler extended to both direct and indirect terminations. Wis. Stat. § 218.01(3)(a)17. (1987-88). It would not have been outside the realm of possibility for a dealer to argue that the denial of a request to relocate constituted an indirect termination. In addition, the dispute between Kolosso and Chrysler concerned Kolosso's request to move in order to combine its Chrysler facilities with an existing Toyota dealership. Prior to Kolosso's entering into its dealership agreement with Chrysler, the Wisconsin Legislature added a provision to the state's motor vehicle dealership law that prohibited manufacturers from "unreasonably refus[ing] to allow a dealership to share its facilities with another . . . ." Wis. Stat. § 218.01(3)(a)26m. (1987-88). The court of appeals was correct in described Wisconsin's regulation of dealership location requests prior to the enactment of Wis. Stat. § 218.01(3x) as a "gray area in the dealership law." Pet-Ap. 9a, 11a.

The purpose of applying Wis. Stat. § 218.01(3x) to existing motor vehicle dealership contracts was broader than suggested in the third paragraph of the petition. Chrysler states that the object of the law was "to address the issue of dealership relocation." *See* Pet. at 3. In point of fact, the law established an administrative procedure for resolving dealership disputes not involving direct terminations but likely to have a substantial economic impact on a dealership. In addition to disputes concerning dealer location, the new

law established the same administrative procedure for resolving disputes concerning a change in a dealership's ownership or executive management, a transfer of a dealership's assets to another person or the addition of another franchise at an existing franchise's location, where any of these proposed actions required the manufacturer's prior approval under the terms of the dealership agreement. Wis. Stat. § 218.01(3x)(b)1.

These types of dealership disputes were already subject to Wisconsin's motor vehicle dealers law at the time of Wis. Stat. § 218.01(3x)'s enactment. *See* Wis. Stat. § 218.01(3)(a)23. and 26m. (1987-88) (prohibiting manufacturers from unreasonably refusing to allow changes in dealership ownership or executive management, and from unreasonably refusing to allow dealers to share their facilities). But the procedure for enforcing the earlier provisions had been awkward, subjecting the manufacturer to possible license revocation proceedings, Wis. Stat. § 218.01(3)(a), and/or treble damages in a private civil action brought by the dealer. Wis. Stat. § 218.01(9).

Consistent with the state's prior regulation of similar types of dealership disputes and the fact that relocation disputes constituted "a gray area of the dealership law," Pet-Ap. 9a, 11a., 1993 Wisconsin Act 13, sec. 48 made the new procedure established in Wis. Stat. § 218.01(3x) applicable to existing dealership contracts.

The new procedure does not permit a dealer to bypass a franchise agreement's requirement of requesting approval to take any of the proposed actions. Rather, the statute comes into play only upon the dealer's providing written notice of the proposed action to both the manufacturer and the Wisconsin Department of Transportation. Wis. Stat. § 218.01(3x)(b)1. If the request is denied, the law requires the manufacturer to provide a written statement explaining its reasons for denying the request. Wis. Stat. § 218.01(3x)(b)2. The manufacturer's

filing of its statement of reasons has the legal effect of prohibiting the dealer from undertaking the proposed action "unless it receives an order permitting it to do so from the division of hearings and appeals under par. (c)2." *Id.* Certain grounds for denial are exempted from the statutory procedure altogether. Wis. Stat. § 218.01(3x)(d). The manufacturer's written statement is not provided to the Wisconsin Division of Hearings and Appeals, as Chrysler writes (Pet. at 4), but to the dealer and to the state transportation department, which licenses dealers and manufacturers. Wis. Stat. § 218.01(3x)(b)2. Further state involvement occurs only if the dealer files a complaint for determination of good cause for permitting the proposed action. Wis. Stat. § 218.01(3x)(b)3. No state investigation or enforcement action is triggered by the filing of a complaint. Rather, the Wisconsin Division of Hearings and Appeals, through an administrative law judge, is to "promptly schedule a hearing and decide the matter," Wis. Stat. § 218.01(3x)(b)3., with the parties responsible for discovering and presenting relevant evidence.[1] As previously noted, a dealer may not undertake the proposed action unless an order finding good cause has been entered. Wis. Stat. § 218.01(3x)(b)2. A dealer is also prohibited from taking the proposed action "pending the determination of the matter." Wis. Stat. § 218.01(3x)(b)3. Finally, if good cause is found for permitting the dealer's proposed action, the administrative law judge's order may require the fulfillment of appropriate conditions both before and after the proposed action is undertaken. Wis. Stat. § 218.01(3x)(c)2.

The court of appeals' decision suggests that the manufacturer is required to demonstrate "good cause" for denying a relocation request. *See* Pet-Ap. 3a (referring to

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[1] Under the state's motor vehicle dealer law, and under Wisconsin law generally, see Wis. Stat. §§ 15.03, 15.103(1), the Wisconsin Division of Hearings and Appeals serves solely in an adjudicative capacity, having no independent regulatory function or authority.

possibility of Chrysler's "persuad[ing] the agency that administers the dealership law that it has good cause to forbid this dealer to relocate"). This part of its decision is incorrect. The statute places the burden on the dealer complaining of the manufacturer's denial to demonstrate "good cause for permitting the proposed action," Wis. Stat. § 218.01(3x)(b)3., the "proposed action" referring to the action being proposed by the dealer. Wis. Stat. § 218.01(3x)(b)1. Chrysler's statement that in making this determination, the Division of Hearings and Appeals "is not even required to consider . . . the economic reasonableness of the manufacturer's business decision" represents an unfounded reading of the law. Pet. at 4. Wisconsin Stat. § 218.01(3x)(c)1.b., e. & f. expressly provide that the Division may consider the manufacturer's reasons for not approving the proposed action, the degree to which the proposed action will interfere with the orderly and profitable distribution of the manufacturer's products and the impact of the proposed action on other dealers. The only reason the state can imagine for the Division's not considering these factors would be if neither party to the administrative proceeding presented argument or evidence concerning them.

The state believes Chrysler is correct that aside from the amendment to Wisconsin's motor vehicle dealership law at issue in this case, the only other Wisconsin statute which applied existing dealership contracts was the Wisconsin Fair Dealership Law, Wis. Stat. ch. 135. Chrysler is correct that the application of the Wisconsin Fair Dealership Law to existing contracts was held unconstitutional by the Wisconsin Supreme Court in *Wipperfurth v. U-Haul Co. of Western Wis., Inc.*, 101 Wis. 2d 586, 304 N.W.2d 767 (1981). *Cf.* Pet. at 3-4. In contrast to Wis. Stat. § 218.01(3x), however, there was no significant prior state regulation of the franchise agreements covered by the Wisconsin Fair Dealership Law. The application of the extensive redefinition of rights under the law to existing (non-motor vehicle) dealer agreements could not be regarded as incremental.

B. Kolosso's Relocation Request.

The record did not establish Chrysler's statement that it denied its dealer's request "because Kolosso's original location was extremely advantageous for the sale of Jeep and Eagle vehicles." *Cf.* Pet. at 5. The record established that reasons similar to those stated in the petition were given by Chrysler in denying Kolosso's request. No factual determination was made whether Chrysler's reasons were in any way pretextual or, if sincerely held, exaggerated to any degree.

C. The District Court Action.

The state would note that the magistrate judge's recommendation to abstain was based on Chrysler's seeking to prevent Kolosso from prosecuting its administrative complaint before the Wisconsin Division of Hearings and Appeals based on a state law argument concerning agency jurisdiction. *See* Pet. at 6, Pet-Ap. 21a n.2; 35a-36a, 40a. This ground for abstention was removed by Chrysler's abandoning its state law objection in subsequent proceedings. *See id.* 14a.

It should also be noted that Chrysler's district court action was in all material respects a facial challenge to the application of Wis. Stat. § 218.01(3x) to existing motor vehicle dealership contracts. The actual application of the statute to Chrysler's relocation request remains conjectural, since no hearing by the Wisconsin Division of Hearings and Appeals has taken place, pending outcome of Chrysler's federal case.

D. The Seventh Circuit's Decision.

The state disagrees with several parts of Chrysler's summary of the Seventh Circuit's decision. Because this disagreement is set out in our statement of reasons for denying the petition, it is not repeated here.

REASONS FOR DENYING THE PETITION

The questions presented by the petition are not framed by the Seventh Circuit's decision. The court of appeals had before it a state law which "in effect regularized a gray area in [Wisconsin's motor vehicle] dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate." Pet-Ap. 9a. The new law's incremental clarification and procedural simplification of what had formerly been a grey area of the law meant that the impairment was not substantial. Moreover, this incremental clarification and procedural simplification constituted an important public purpose of the law. The Seventh Circuit's decision is properly regarded as an example of a case-specific analysis of economic interests and expectations in the context of contractual relations already subject to extensive state regulation.

The decision of the court of appeals is therefore not in conflict with either this Court's precedents or the decisions of other circuits. It does not establish any new framework for analysis or purport to make new law. The particularized nature of its decision limits its application to other cases. Chrysler's concerns about the impact of the decision on national distribution systems are exaggerated.

I. EVEN IF THE SEVENTH CIRCUIT'S DECISION IS READ AS HOLDING "THAT A STATE MAY FREELY IMPAIR A CONTRACT WITH *NO* PUBLIC JUSTIFICATION, SO LONG AS THE IMPAIRMENT IS 'SMALL,'" PET. AT (I), THAT HOLDING WOULD BE CONSISENT WITH THIS COURT'S INTERPRETATION OF THE CONTRACT CLAUSE.

As argued in the next section, the State of Wisconsin does not believe Chrysler has fairly or accurately summarized the Seventh Circuit's decision. The court of appeals correctly determined that the challenged state law "regularized a gray area in the dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate." Pet-Ap. 9a. The court of appeals' decision is properly regarded as a thoughtful application of this Court's statement in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978), that "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." The challenged law was properly upheld because it effected an incremental and clarifying change in state law, with respect to a category of contractual relations which had been subject to substantial state regulation for many years prior to Chrysler's dealership agreement.

At the same time, the court of appeals also stated that "little, predictable impairments—the ones that take only small steps along a path that was discernible when the original contract was signed—don't have to be justified at all . . . ." Pet-Ap. 10a. To the extent its decision is read as resting on this statement of general principle, the statement is entirely consistent with this Court's interpretation of the contract clause.

Where a state statute is claimed to impair the contractual obligations of private parties (as opposed to the obligations of the state itself, *cf. United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977)), a three-prong test is used to determine whether the challenged statute violates the Contract Clause:

> The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."
>
> . . . .
>
> If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . .
>
> Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *United States Trust Co.*, 431 U.S., at 22, 97 S. Ct., at 1518. Unless the State itself is a contracting party, see *id.*, at 23, 97 S. Ct., at 1518, "[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.*, at 22-23, 97 S. Ct., at 1518.

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-13 (1983) (citations and footnotes omitted).

This statement plainly implies that "a significant and legitimate public purpose behind the regulation" is required to be shown only after "the threshold inquiry" has been made as to "'whether the state law has, in fact, operated as a

substantial impairment of a contractual relationship.'" This was stated explicitly in *Allied Structural Steel*:

> The severity of the impairment measures the height of the hurdle the state legislation must clear. *Minimal alteration of contractual obligations may end the inquiry at its first stage.* Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

438 U.S. at 245 (emphasis added) (footnote omitted).

"[W]hether the industry the complaining party has entered has been regulated in the past," *Energy Reserves Group, Inc.*, 459 U.S. at 411, is relevant to determining the degree of impairment. *See also Allied Structural Steel Co.* (stating relevant inquiry to be whether challenged state legislation operates "in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken," or whether it "invaded an area never before subject to regulation by the State.") *Id.*, 438 U.S. at 250.

Accordingly, even if Chrysler's reading of the Seventh Circuit's decision were correct, as holding that "Wisconsin's 'small' impairment of Chrysler's contract 'do[es]n't have to be justified at all' by a public purpose," Pet. at 9, quoting Pet-Ap. 10a, that holding would not represent a departure from precedent or the development of any new interpretive framework warranting review.

II. THE FIRST QUESTION PRESENTED BY THE PETITION IS NOT FRAMED BY THE SEVENTH CIRCUIT'S DECISION.

The petition is based on a simplified reading of the Seventh Circuit's decision. It therefore fails to present a significant question concerning the interpretation of the contracts clause.

According to Chrysler, the central holding of the court of appeals was that "a state may freely impair a contract with *no* public justification, so long as the impairment is 'small.'" Pet. at (I). In the petition's statement of the case, Chrysler describes the court of appeals as having "determined that, since Wisconsin had previously enacted *prospective* legislation preventing franchise *termination* except for good cause, Chrysler should have expected *retroactive* legislation preventing dealer *relocation* in the absence of good cause." Pet. at 8. Neither assertion accurately summarizes the court of appeals' decision.

In determining the degree of impairment of Chrysler's contract rights, the court of appeals relied on precedent that emphasized "the degree to which the activity to which the contract pertains was already heavily regulated when the contract was made." Pet-Ap 6a. After reviewing the extent of existing state regulation and assessing the nature of the challenged law, the Seventh Circuit stated that "[t]he little, predictable impairments--the ones that take only small steps along a path that was discernible when the original contract was signed--don't have to be justified as all." Pet-Ap. 10a.

Standing alone, this statement is not a sufficient summary of the Seventh Circuit's reasoning or holding. The statement comes towards the end of the decision, where the court sides with Chrysler, expressing incredulity towards Wisconsin's need to protect motor vehicle dealers from the economic domination of manufacturers. A much better

single-sentence summary of the court of appeals' reasoning is found in the next paragraph of the decision, where the court writes:

> Chrysler should have known in 1988 [when it entered into the dealership agreement with Kolosso] that it did not have a solid right to prevent a dealer from changing the location of the dealership, that it was operating in a grey area of the dealership law, that the law might some day be amended to regulate disputes over relocation specifically, and that if this happened it might not be able to get the amendment struck down under the contracts clause.

Pet-Ap. 10a-11a. This conclusion was not only correct, but represented the outcome of the court's making a "judgment[] of degree" concerning the foreseeability of the impairment. *Id.* at 7a. The court of appeals' decision exemplifies the type of careful analysis appropriate to a case where a duly enacted state statute is being challenged as violative of contract clause principles. The Seventh Circuit's decision represents a reasoned application of this Court's precedent to a particular state regulatory regime and a specific private contractual relation. It does not give rise to the first question presented in the petition.

As the court of appeals noted, the automobile dealership relationship has been heavily regulated in Wisconsin for more than six decades. Pet-Ap. 6a, citing Wis. Stat. § 218.01 (1937). Statutory language in existence before Chrysler's dealership agreement with Kolosso proscribed the termination of a dealership "unfairly, without due regard to the equities or without just provocation." Pet-Ap. 7a, citing Wis. Stat. § 218.01(3)(a)17. This language has been interpreted to forbid termination without good cause. *See* Pet-Ap. 7a, citing *Nagle Motors v. Volkswagen N. C. Distributor*, 51 Wis. 2d 413, 187 N.W.2d 374, 385 (1971); *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71

N.W.2d 420, 426 (1955), *reh'g granted*, 270 Wis. at 503a-03b, 71 N.W.2d at 428.

At the beginning of its decision, the court of appeals commented that Wisconsin's Motor Vehicle Dealers Law did not "*expressly* limit an auto manufacturer's right to" require a dealer to obtain the manufacturer's prior approval before relocating its facilities. Pet-Ap. 1a (emphasis added). But the absence of express limitation did not mean that the exercise of a manufacturer's right to approve or disapprove a request to relocate had been unregulated. As the court of appeals noted,

> Although the law did not contain a specific provision dealing with relocation other than one allowing a dealer to complain if another dealer relocated into his area, the law's curtailment of the manufacturer's right of termination cast a cloud over *all* contractual clauses restricting a dealer's freedom of action, any one of which might be challenged in application as unfair, inequitable, unprovoked, or, in short, as not being based on good cause.

Id. at 7a. The court explained that prior statutory restrictions would be implicated at least in a case where a dealer attempted to relocate without obtaining the manufacturer's consent and the manufacturer either sought to terminate the dealer or to enjoin an alleged breach of contract. *Id.* at 8a.

In arguing that the challenged statute was devoid of public purpose, Chrysler relies on the court of appeals' statement that the justifications offered by the state's lawyers

were hard to take seriously. Pet-Ap 10a.[2] But the court itself articulated an important purpose of the law. The court of appeals wrote:

> The 1993 amendment in effect regularized a gray area in the dealership law by creating a specific procedure for resolving disputes over dealers' requests to relocate. Before then, as we have said, such disputes were likely to be resolved under a similarly vague substantive standard, only in the context of a termination. The change was thus largely procedural.

Pet-Ap. 9a.

Accordingly, the statute has the public purpose of providing a specific procedure for resolving disputes over dealers' requests to relocate, clarifying what had formerly been a "gray area in the dealership law."

That this was as much the law's purpose as the redress of disparities in economic power is evident from the administrative procedure created and by the law's coverage of similar types of termination disputes.

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[2] It is clear from the remainder of the Court's statement that the reference is to the argument that the law seeks to redress an imbalance in bargaining strength and economic power between automobile manufacturers and their dealers. *See* Pet-Ap. 10a. While the court of appeals was not particularly moved by these concerns, it is also clear that they have been recognized as an important public justification for a state's replacing a system of private governance for this species of contractual relationship by one in which significant aspects of the relationship are legislatively defined. *See, e.g., New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 100-01 (1978) ("[t]he disparity in bargaining power between automobile manufacturers and their dealers prompted Congress and some 25 States to enact legislation to protect retail car dealers from perceived abusive and oppressive acts by the manufacturers"); *Forest Home Dodge, Inc., v. Karns*, 29 Wis. 2d 78, 85, 138 N.W.2d 214 (1965) (referring to law's "recognition of the gross disparity of bargaining power between the manufacturer of automobiles and the local retailer" and "the long history of the abuse of dealers by manufacturers").

As explained in Section A of the state's statement of the case (*supra* at 2-5), the specific procedure places relocation and similar disagreements arising out of the automobile franchise relationship before a neutral administrative tribunal. This provides an adjudicative forum that is alternative to the state's trial courts. This will permit the development of a cohesive body of interpretative decisions by the tribunal responsible for deciding other dealership cases.[3] The resolution of disputes is likely to be more streamlined and cost effective than conventional litigation. The law also seeks to confine dealer/manufacturer relocation disputes, rather than allowing them to escalate until a dealer decides to move unilaterally and/or a manufacturer invokes its powers of termination.

In creating Wis. Stat. § 218.01(3x), the Wisconsin Legislature made several other non-termination controversies subject to the same procedure. These provisions could not be regarded as substantive impairments of existing contracts, since the other areas of dealer disputes had previously been subject to regulation, but under a more awkward procedure requiring suspension or revocation of the manufacturer's state license and/or a civil action for treble damages brought by the affected dealer. This fact best explains the law's being made applicable to existing contracts. Most of the aspects of existing contracts subject to the new procedure were already subject to express regulation prior to the law's enactment, while relocation disputes operated within a grey area of the existing dealership law.

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[3] The Wisconsin Division of Hearings and Appeals is the successor agency to the former Wisconsin Office of the Commissioner of Transportation, which previously heard motor vehicle dealership disputes.

III. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS. MOREOVER, PETITIONER'S PERCEPTION OF THE IMPACT OF THE DECISION IS EXAGGERATED.

The court of appeals' decision involved the court's exercising its "best judgment," Pet-Ap. 7a, regarding the foreseeability, and therefore the degree, of impairment, in light of prior state regulation of the motor vehicle dealer relationship. Given its particularized inquiry, and the appropriateness of such an analysis under contract clause precedent, it is not surprising that the Seventh Circuit's decision does not conflict with decisions of other circuits.

Petitioner's reference to the court of appeals' adopting a minority position, *see* Pet. at 19, is not accurate. The application of a flexible constitutional standard to a specific contractual relationship within the context of a specific state regulatory system is likely to produce cases both permitting and disallowing new regulatory enactments. That different results are reached in particular cases does not demonstrate a split concerning governing legal standards.

The principal circuit decision that Chrysler identifies as in conflict with the Seventh Circuit's decision is *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8th Cir. 1994). In assessing the claimed conflict, it is important to recognize that the case did not involve an incremental extension of already substantial state regulation to an area of contract disputes "operating in a grey area of the dealership law . . . ." Pet-Ap. 11a. *Holiday Inns Franchising, Inc.* involved the enactment and retrospective application of an Iowa law regulating the transfer and termination of food service and hotel franchises. These types of franchises were not previously subject to significant state regulation. *See McDonald's Corp. v. Nelson*, 822 F. Supp. 597 (S.D. Iowa

1993), *aff'd sub nom. Holiday Inns Franchising v. Branstad*, 29 F.3d 383 (8th Cir. 1994). The Eighth Circuit began its brief decision by emphasizing that "in determining whether an impairment is substantial, and thus unconstitutional, a court should take into account whether the kind of contract or relationship that furnishes the subject matter of the dispute had previously been the subject of regulation." *Holiday Inns Franchising*, 29 F.3d at 384. Accordingly, the Eighth Circuit's reference to "the retrospective application of statutes similar to the one here, and in the circumstances that are present in this case, ha[ving] almost uniformly been held unconstitutional," *id.* at 385, did not extend to the kind of incremental law considered by the Seventh Circuit. The same is true of the decision of the Wisconsin Supreme Court in *Wipperfurth* which petitioner points to as establishing the supposed non-foreseeability of small changes in Wisconsin's existing system of regulation. In *Wipperfurth*, the Wisconsin Supreme Court struck down the retrospective application of the Wisconsin Fair Dealership Law. The law, not applicable to motor vehicle dealerships, created a comprehensive redefinition of the rights of franchisors and franchisees. Prior to the law's enactment, the franchise relationship was largely free from state regulation.

Finally, Chrysler claims that the Seventh Circuit's decision will undermine the ability of national companies to distribute their goods. Its concerns are exaggerated. First, whatever impact the law might have, there is no contention that Wisconsin may not apply the law to newly-entered dealership agreements. Second, the Seventh Circuit's application of a flexible constitutional standard to the specific contractual relationship within the context of the specific state regulatory system is not likely to have a very general reach. The court did not purport to state a new legal standard and, in point of fact, it did not. Third, the Wisconsin Division of Hearings and Appeals has not yet had an opportunity to hear the administrative complaint. Without knowing the strength of Chrysler's interests in preventing

relocation, or Kolosso's in moving, it can hardly be assumed that the Division will uphold the dealer's complaint. Finally, as the court of appeals noted, the contracts clause will continue to restrain the application of Wis. Stat. § 218.01(3x) to Chrysler's dispute. *See* Pet-Ap. 11a.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

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DAIMLERCHRYSLER CORPORATION,

PETITIONER,

V.

KOLOSSO AUTO SALES, INC.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC., GENERAL MOTORS CORPORATION AND FORD MOTOR COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE SEVENTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S PRECEDENTS CONCERNING THE EFFECT OF PRIOR REGULATION ON THE SCOPE OF THE PROTECTION AFFORDED BY THE CONTRACT CLAUSE	4
II. THE SEVENTH CIRCUIT'S OPINION WILL ENGENDER WIDESPREAD UNCERTAINTY REGARDING THE ENFORCEABILITY OF FRANCHISE CONTRACT TERMS, AND ENCOURAGE THE ADOPTION OF UNCONSTITUTIONAL REGULATIONS IN OTHER STATES	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234 (1978) 9

Energy Reserves Group, Inc. v. Kansas Power & Light Co.,
459 U.S. 400 (1983) 4, 5

Gus Machado Buick-GMC Truck, Inc. v. General Motors Corp., 623 So.2d 810 (Fla. Dist. Ct. App. 1993) 7

Home Building & Loan Ass'n v. Blaisdell,
290 U.S. 398 (1934) 3

Kaiser v. General Motors Corp.,
396 F. Supp. 33 (E.D. Pa. 1975) 7

Kumho Tire Co., Ltd., v. Carmichael,
131 F.3d 1433 (11th Cir. 1997), *cert. granted*,
118 S. Ct. 2339 (U.S. June 22, 1998) (No. 97-1709) 1

State Oil Co. v. Khan,
522 U.S. 3 (1997) 1

United States Trust Co. v. New Jersey,
431 U.S. 1 (1977) 3, 9

Veix v. Sixth Ward Building & Loan Ass'n,
310 U.S. 32 (1940) 3, 4, 5

STATUTES

Wis. Stat. § 218.01 ..... 2, 8

INTEREST OF THE *AMICI CURIAE*[1]

The Association of International Automobile Manufacturers, Inc. ("AIAM") is a trade association representing domestic subsidiaries of international automobile manufacturers doing business in the United States and abroad.[2] One of the AIAM's most important functions has been to represent the interests of its members in litigation pending before the courts of the United States.

The AIAM's members have a vital interest in protecting the franchise agreements negotiated between automobile manufacturers and their dealers from unwarranted impairment by the states. As discussed in more detail below, forty-nine states regulate franchise relationships between automobile manufacturers and dealers. Accordingly, the AIAM has sought to advance the interests of its members by filing amicus briefs in numerous cases involving state motor vehicle franchise statutes, as well as other issues of substantial importance to automobile manufacturers. For example, the AIAM has recently filed *amicus* briefs before this Court in *State Oil Co. v. Khan,* 522 U.S. 3 (1997) and in *Kumho Tire Co., Ltd., v. Carmichael,* 131 F.3d 1433 (11th Cir. 1997), *cert. granted,* 118 S. Ct. 2339 (U.S. June 22, 1998) (No. 97-1709).

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amici,* their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

[2] The Association's members include: American Honda Motor Co., Inc.; American Suzuki Motor Corp.; BMW of North America, Inc.; Fiat Auto U.S.A., Inc.; Ferrari North America, Inc.; Hyundai Motor America; Isuzu Motors America, Inc.; Kia Motors America, Inc.; Land Rover North America, Inc.; Mazda North American Operations; Mercedes-Benz of North America, Inc.; Mitsubishi Motor Sales of America, Inc.; Nissan North America, Inc.; Porsche Cars North America, Inc.; Rolls-Royce Motor Cars, Inc.; Subaru of America, Inc.; Toyota Motor Sales, U.S.A., Inc.; Volkswagen of America, Inc.; and Volvo Group North America, Inc. The Association also represents various manufacturers of tires and other original equipment with production facilities in the United States and abroad.

General Motors Corporation ("GM") and Ford Motor Company ("Ford") are the world's largest and second largest vehicle manufacturers, respectively. Like the AIAM's members, GM and Ford have a vital interest in protecting their agreements with dealers from unwarranted impairment by the states.

In the decision below, the Seventh Circuit held that a retroactive amendment to the Wisconsin Motor Vehicle Dealers Law, Wis. Stat. § 218.01, did not constitute a "substantial impairment" of the franchise contract between petitioner Chrysler Corporation and respondent Kolosso Auto Sales, Inc. and, therefore, did not violate the Contract Clause of the United States Constitution. In so doing, the Seventh Circuit became the first circuit to uphold the constitutionality of such retroactive franchise legislation.

The Seventh Circuit's interpretation of the Contract Clause conflicts with prior decisions of this Court and other courts of appeals, and jeopardizes the enforceability of material terms in tens of thousands of contracts between automobile manufacturers and their dealers. This Court should grant review to resolve this important conflict now in order to forestall further disruption of the constitutionally protected contractual rights of automobile manufacturers. Accordingly, *amici* respectfully urge this Court to grant the petition for a writ of certiorari and reverse the decision of the circuit court.

SUMMARY OF ARGUMENT

In the decision below, the Seventh Circuit held that the State of Wisconsin did not violate the Contract Clause when it abrogated manufacturers' existing contractual rights to control the location of their dealerships. The court of appeals held that the retroactive regulation of contractual terms governing franchise *relocation* was "foreseeable" at the time petitioner executed its contract—and therefore unprotected by the Contract Clause—because the Wisconsin Motor Vehicle Dealers Law, Wis. Stat. § 218.01, regulated the *termination* of automobile franchise agreements at that time.

As petitioner demonstrates, the Seventh Circuit's opinion conflicts with controlling Supreme Court authority requiring that state laws which impair contracts serve a valid public purpose, *see* Petition at pp. 11-15, and creates a split among the circuits regarding the constitutionality of retroactive franchise legislation, *id.* at pp. 15-20. In becoming the first court of appeals to uphold such legislation, the Seventh Circuit has unsettled the contractual expectations of an industry where most, if not all, franchise agreements designate a specific franchise location and require manufacturer approval of any relocation. These relocation clauses are of central importance to the parties' bargain.

This Court's precedents firmly establish that the Seventh Circuit's foreseeability analysis unreasonably circumscribes the important protections afforded by the Contract Clause. Even though the State of Wisconsin had never before regulated contract provisions governing the relocation of automobile franchises, the court of appeals held that such regulation could be foreseen—as a matter of law—based upon the State's prior regulation of contract termination. Under this Court's precedents, however, the relevant inquiry is whether the specific contractual term at issue—not some other contract term—was subject to regulation when the contract was executed. *See, e.g., Veix v. Sixth Ward Building & Loan Ass'n,* 310 U.S. 32, 38 (1940) (holding that a party who purchases an enterprise "already regulated *in the particular to which he now objects*" purchased subject to further legislation "upon the same topic") (emphasis added). The Seventh Circuit abandoned this principle in favor of an open-ended "foreseeability" standard that undermines the very purpose of the Contract Clause, which is "to encourage trade and credit by promoting confidence in the stability of contractual obligations." *United States Trust Co. v. New Jersey,* 431 U.S. 1, 15 (1977) (citing *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 427-28 (1934)).

Taken to its logical conclusion, the Seventh Circuit's analysis would effectively eliminate Contract Clause protections in the

automobile industry and other regulated franchise industries. Once a state has chosen to regulate franchise termination, virtually every other provision of the franchise agreement could be subject to retroactive impairment by the state on the theory that any plausible regulation is foreseeable as a matter of law. Yet there is no substantial justification for retroactively altering the contract rights of manufacturers—rights which often determine whether a manufacturer will succeed or fail in a local market. In light of the fact that forty-nine states regulate automobile franchise relationships, and forty-eight of those states currently regulate the termination of such franchises, the Seventh Circuit's decision will engender widespread uncertainty regarding the enforceability of franchise agreements and encourage other jurisdictions to follow Wisconsin's lead in the adoption of unconstitutional regulations abrogating critical contractual terms. *Amici* respectfully urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Seventh Circuit.

ARGUMENT

I. THE SEVENTH CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S PRECEDENTS CONCERNING THE EFFECT OF PRIOR REGULATION ON THE SCOPE OF THE PROTECTION AFFORDED BY THE CONTRACT CLAUSE

The Seventh Circuit's focus on the purported "foreseeability" of the Wisconsin statute at issue has its roots in two opinions of this Court: *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) and *Veix v. Sixth Ward Building & Loan Ass'n*, 310 U.S. 32 (1940). *See* Pet. App. at 6a. In each of those cases, this Court rejected the Contract Clause challenges, relying in part on the fact that the specific contract terms at issue were subject to pre-existing state regulation. *See Kansas Power & Light*, 459 U.S. at 411; *Veix*, 310 U.S. at 38. This Court concluded that the "reasonable expectations" of the parties were

not impaired under these circumstances. *Kansas Power & Light,* 459 U.S. at 416; *see also Veix,* 310 U.S. at 38.

In determining whether a challenged regulation has impaired the reasonable expectations of the contracting parties, this Court has invariably focused on the question of whether the specific contractual provision at issue—as opposed to the general subject matter of the agreement—was regulated at the time of contracting. *See, e.g., Kansas Power & Light,* 459 U.S. at 413-16 (holding that state statute regulating natural gas prices did not "substantially impair" contract for purchase of natural gas, where such prices had been extensively regulated by the state and federal government for many years, and where the contract at issue specifically provided for changes in price depending upon regulatory changes); *see also Veix,* 310 U.S. at 38 (holding that changes in New Jersey statute regulating withdrawals from building and loan associations did not violate Contract Clause where such withdrawal rights were regulated at the time of plaintiff's purchase). As this Court held in *Veix,* "[w]hen [plaintiff] purchased into an enterprise already regulated *in the particular to which he now objects,* he purchased subject to further legislation upon the same topic." *Veix,* 310 U.S. at 38 (emphasis added).

The Seventh Circuit did not adhere to these holdings. The court acknowledged that the State of Wisconsin had never before regulated the relocation of automobile franchises.[3] *See* Pet. App. at 7a. It nevertheless held that the retroactive regulation of franchise relocation did not constitute a "substantial impairment" under the Contract Clause because the Wisconsin statute already regulated termination—a completely separate aspect of the relationship. Pet. App. at 6a-11a. Under *Veix* and *Kansas Power &*

[3] As the Seventh Circuit noted, prior to the 1993 amendment, the statute's only reference to relocation was a provision permitting a dealer to complain if another dealer relocated into the complaining dealer's relevant market area. *See* Pet. App. at 7a. That provision, of course, did not restrict a manufacturer's right to deny a dealer's request to relocate. *Id.*

Light, however, contracting parties were only found to have assumed the risk that regulations governing a specific "topic" of their contract could be changed by the state. Armed with the knowledge that certain terms of a contractual relationship have been subjected to regulation—and, hence, to regulatory change—the contracting parties could take the risk of such changes into account in negotiating their agreement. But parties are not required to guess whether and how the state might choose to regulate an entirely different aspect of their relationship at some unspecified point in the future.

The Seventh Circuit's "foreseeability" analysis requires precisely such speculation. Indeed, as the Seventh Circuit itself recognized, the "evolution" from the existing regulation of termination to the provision regulating relocation was merely "plausible" at the time of the contract. Pet. App. at 7a. As such, it is unreasonable to presume that the contracting parties could have taken such an "evolution" into account when negotiating their agreement. By shifting the focus of the "foreseeability" (or "reasonable expectations") inquiry away from the specific contractual term at issue—in this case, franchise relocation—and toward the general subject matter of the contract, the Seventh Circuit fundamentally altered the governing standard established in *Veix* and in *Kansas Power & Light*. In order to restore the rule established by this Court more than a half century ago, and to ensure that the legitimate economic interests of contracting parties are afforded the protection mandated by the Constitution, this Court should grant the petition for a writ of certiorari and reverse the Seventh Circuit's decision.

II. THE SEVENTH CIRCUIT'S OPINION WILL ENGENDER WIDESPREAD UNCERTAINTY REGARDING THE ENFORCEABILITY OF FRANCHISE CONTRACT TERMS, AND ENCOURAGE THE ADOPTION OF UNCONSTITUTIONAL REGULATIONS IN OTHER STATES

The Seventh Circuit's failure to adhere to this Court's controlling precedents has obviously impaired hundreds of contracts in the

State of Wisconsin. The effects of the Seventh Circuit's decision will extend far beyond the Wisconsin borders, however. Virtually all automobile franchise agreements require dealers to operate from a specific location and facilities previously approved by the manufacturer, and foreclose relocations without the approval of the manufacturer. The reason for such provisions is manifest: the location of an automobile franchise is a critical factor to success in the marketplace. *See, e.g., Kaiser v. General Motors Corp.*, 396 F. Supp. 33, 40 (E.D. Pa. 1975) ("[T]he lower courts have uniformly sustained the reasonableness and legality of the franchise location clause in actions brought under the Automobile Dealers' Day in Court Act . . . ."); *see also Gus Machado Buick-GMC Truck, Inc. v. General Motors Corp.*, 623 So.2d 810, 813 (Fla. Dist. Ct. App. 1993) ("Location is certainly an important consideration in any type of franchise agreement . . . ."). In the wake of the Seventh Circuit's opinion, however, the enforceability of those provisions is now in doubt.

Nor are the effects of the Seventh Circuit's decision limited to the issue of relocation. In fact, the Seventh Circuit explicitly recognized that its reasoning applied to any contractual terms restricting a dealer's freedom of action:

> [T]he law's curtailment of the manufacturer's right of termination cast a cloud over *all* contractual clauses restricting a dealer's freedom of action, any one of which might be challenged in application as unfair, unreasonable, inequitable, unprovoked, or, in short, as not being based on good cause.

Pet. App. at 7a (emphasis in original).

Thus, according to the Seventh Circuit, if a manufacturer's right to terminate a franchise agreement is subject to regulation at the time of contracting, all of the other contractual rights for which the manufacturer has negotiated may be subject to retroactive nullification by the State. Not even the Wisconsin statute purported to go so far in eviscerating the contractual rights of

manufacturers. In the very provision cited by the Seventh Circuit, which prohibits manufacturers from terminating franchise agreements "unfairly, without due regard to the equities or without just provocation," the statute defines "just provocation" to include a "material breach" of the franchise agreement by the dealer. *See* Wis. Stat. § 218.01(3)(17). Notwithstanding the implicit protection for the manufacturer's contractual rights embodied in this provision, the Seventh Circuit held that such rights are subject to change, at any time, by retroactive statute.

The implications of the Seventh Circuit's reasoning are practically endless. At this time, forty-nine states regulate the relationships between automobile manufacturers and their dealers; all but one of those states specifically regulate the termination of such relationships. Under the circuit court's "foreseeability" analysis, the terms of every dealer agreement in those states—and in any other state that chooses to regulate franchise termination in the future—may be subject to retroactive change.

As a result, the contractual rights obtained by manufacturers are all at risk of abrogation by state legislatures that may be inclined to advance aggressively the economic welfare of in-state dealers at the expense of out-of-state manufacturers. Having bargained for certain warranty and other service obligations on the part of the dealer, for example, the manufacturer must live with the risk that the dealer will be relieved of such obligations, retroactively, by the state.

Under the Seventh Circuit's analysis, in other words, a party that agreed to a contractual obligation can simply appeal to the legislature for relief from that obligation. With such uncertainty regarding the enforceability of their contract rights, manufacturers will be unable to make even the most basic business decisions—such as pricing and distribution—in a rational fashion. That is precisely what the Contract Clause was designed to prevent. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 15 (1977) (noting that Contract Clause was designed "to

encourage trade and credit by promoting confidence in the stability of contractual obligations").

If not corrected by this Court, the Seventh Circuit's decision in this case will cast doubt on the enforceability of automobile franchise agreements throughout the United States. In order to remove the uncertainty created by the Seventh Circuit's opinion, and to prevent the needless proliferation of unconstitutional regulation that undermines important contractual rights, this Court should grant review and reverse. *See, e.g., Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978) (intervening to enforce limits on state power embodied in the Contracts Clause); *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977) (same).

CONCLUSION

For the reasons set forth, *amici* respectfully urge this Court to grant the petition for a writ of certiorari, and to reverse the decision of the court of appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

KOLOSSO AUTO SALES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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1488

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES . . . . . (ii)

A. The Seventh Circuit Did Not Assume — "Implicitly" Or Otherwise — That The State Had A Public Purpose. 2

B. The Conflict In The Lower Courts On The Effect Of Prior Retroactive Legislation. 5

1. Prior Wisconsin Statutory Provisions Did Not Regulate the Relocation of Dealers. 6

2. Kolosso's Assumptions On The Merits Do Not Alter The Circuit Conflict. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases:

Allied Structural Steel v. *Spannaus*,
438 U.S. 234 (1978) 3, 4

Energy Reserves Group, Inc. v.
Kansas Power & Light Co.,
459 U.S. 400 (1983) 2

Holiday Inns Franchising v. *Branstad*,
29 F.3d 383 (8th Cir. 1994) . . . . . passim

Kuhl Motor Co. v. *Ford Motor Co.*,
71 N.W.2d 420 (Wis. 1955) 5

New Motor Vehicle Bd. v. *Orrin W. Fox Co.*,
439 U.S. 96, 106 (1978) 5

Triegle v. *Acme Homestead Ass'n*,
297 U.S. 189 (1936) 1, 3, 5

Veix v. *Sixth Ward Building & Loan Ass'n*,
310 U.S. 32 (1940) 8

Wipperfurth v. *U-Haul Co.*,
304 N.W.2d 767 (Wis. 1981) 5

Statutes:

Wis. Stat. § 218.01(2)(e) (1985-86) 7

Wis. Stat. §218.01(3)(a)(11) (1985-86) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes:

Wis. Stat. § 218.01(3)(a)(14) (1985-86) 6

Wis. Stat. § 218.01(3)(a)(16) (1985-86) 6

Wis. Stat. § 218.01(3)(a)(17) (1985-86) 6

Wis. Stat. § 218.01(3)(a)(24) (1985-86) 7

Wis. Stat. § 218.01(3)(a)(26) (1985-86) 7, 8, 9

Wis. Stat. § 218.01(5)(a) (1985-86) 6

Wis. Stat. § 218.01(3)(a)(32) (1985-86) 8, 9

Wis. Stat. § 218.01(3)(f)(1) (1985-86) 8, 9

Other Authorities:

THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961). 3

NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, reported by James Madison, August 28, 1787, (Norton ed. 1987) 10

REPLY BRIEF FOR PETITIONER

The Brief in Opposition fails to engage the issues raised in the Petition. Respondent Kolosso does not deny that the Seventh Circuit's holding that "little" contractual impairments "need not be justified" (App. 10a) flatly contradicts this Court's requirement that a state's impairment of contracts "must be * * * for an end which is in fact public." *Triegle* v. *Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936). Moreover, respondent does not deny that the Eighth Circuit's reasoning in *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383, 385 (8th Cir. 1994), cannot be reconciled with the decision below. And Kolosso does not deny that, in the absence of clear guidance from this Court, the lower courts will be in disarray over the appropriate criteria to judge the "substantiality" of a contract impairment.

Instead, Kolosso seeks to deflect attention from the decision below, and its unsettling effect on Contract Clause jurisprudence, by raising two irrelevant arguments. First, respondent erroneously asserts that the Seventh Circuit, contrary to its plain holding that "little [contractual] impairments * * * don't have to be justified at all" (App. 10a), implicitly "assumed" that there was sufficient public justification here to support the State's retroactive impairment of private contracts (Opp. 9-13). Second, Kolosso attempts to obscure the split in the circuits over the significance of the absence of prior ***retroactive*** legislation on the required foreseeability analysis by pointing to different (and wholly inapplicable) prior ***prospective*** legislation (Opp. 17-23).

Neither argument addresses the questions presented or rebuts Chrysler's explanation why review should be granted. As we and the *amici* supporting the Petition have demonstrated, see Brief of the Association of International Automobile Manufacturers, Inc., General Motors Corporation and Ford Motor Company As *Amici Curiae* In Support of Petitioner, the conflict in the lower courts on the issues presented is intolerable and should be resolved promptly by this Court.

A. The Seventh Circuit Did Not Assume — "Implicitly" Or Otherwise — That The State Had A Public Purpose.

Faced with the plain language in the opinion by Chief Judge Posner holding that "little [contractual] impairments * * * don't have to be justified at all" (App. 10a), Kolosso attempts to avoid addressing the clear conflict that holding creates with this Court's precedents by alternately miscasting the decision below and attempting to rewrite it.

1. Kolosso first tries to bury the Seventh Circuit's explicit holding that Wisconsin had no public justification for the statutory amendment at issue.[1] Opp. 9-13. The court of

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[1] In its discussion of the statutory amendment's public justification, Kolosso misapprehends the relationship between the acceptable use of a state's police power and the public justification requirement for Contract Clause purposes. This Court has left no room for error, however: "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983). It is irrelevant, therefore, that the Seventh Circuit did not invoke the phrase "police power" (Opp. 9), because by dispensing with the need for a legitimate public purpose, the court below also eliminated the "guarantee[] that [Wisconsin] is exercising its police power, rather than providing a benefit to special interests."

Ironically, it is precisely this desire to prevent state special interest legislation affecting interstate commerce which prompted adoption of the Contract Clause. "[L]aws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation. * * * The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting public rights, become jobs in the hands of enterprising and influential spectators, and snares to the more industri-

appeals' language, however, cannot be so casually dismissed. The court stated: "Even big, totally unpredictable impairments of the obligation of contracts can survive challenge under the contracts clause if they are responsive to economic emergencies, and even to considerably less exigent needs — so much less as to impel us in that opinion to describe the contracts clause as having been 'defanged.' The little, predictable impairments * * * don't have to be justified at all * * *." App. 9a-10a (citations omitted). The court then proceeded to reject Wisconsin's justifications in no uncertain terms: "the justifications that its lawyers have offered for the 1993 amendment are hard to take seriously." App. 10a.

To avoid the manifest tension between the holding below and this Court's requirement that any state impairment of contracts "must be * * * for an end which is in fact public," *Triegle,* 297 U.S. at 197, Kolosso first argues that the Seventh Circuit merely "d[id] not address" (Opp. 9) the important issue whether Wisconsin provided any public justification for the statutory amendment. Shortly after making this argument, however, respondent asserts that the Seventh Circuit "implicitly assumed" that the justification Kolosso now provides was sufficient. Opp. 12.

Both of these statements, however, fail to address the plain holding in the opinion below: ***no*** public justification is necessary if the contractual impairment is "little." App. 10a. This statement that "little, predictable impairments * * * don't have to be justified ***at all***" (App. 10a, emphasis added), is no mere "paraphrase" of this Court's statement that "[m]inimal alteration of contractual obligations may end the inquiry at its first stage," as Kolosso suggests. Opp. 12., quoting *Allied Structural Steel* v. *Spannaus*, 438 U.S. 234, 245 (1978). Far from holding that ***no*** public justification is

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ous and less-informed part of the community." THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

required, *Allied Structural Steel* reinforces the requirement that "legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the ***public purpose justifying its adoption.***" *Id.* at 244 (emphasis added).

The Seventh Circuit strayed far beyond this Court's precedents. Kolosso's argument that the court of appeals impliedly "assumed" a public purpose fails in the face of the decision's blanket statement that no public justification "at all" is required to satisfy the "defanged" Contract Clause.

2. As a back-door recognition that the Seventh Circuit could not and did not discern a public purpose for the statutory amendment on dealer relocation, Kolosso next attempts (unsuccessfully) to rewrite the court's opinion and provide the missing public justification for the challenged provision. Kolosso's attempt fails because of its fundamental misunderstanding of Chrysler's constitutional challenge and the court of appeals' decision. As the Seventh Circuit recognized, Chrysler here seeks only to have the retroactive section 218.01(3x) declared invalid, not the entire Act. App. 2a. And it is precisely this section for which the State's justifications are "hard to take seriously." App. 10a.

Instead of merely attempting to rewrite the court's holding on this particular retroactive amendment, however, Kolosso sweepingly defends the entire prospective Dealer Act, which is simply not at issue. Opp. 13-16. Indeed, aside from Kolosso's Brief in Opposition, neither party nor the court below has ever considered whether the entire Act has a public justification (nor would they, since the prospective Act would not likely impair any existing contracts).[2]

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[2] Kolosso's unhelpful argument is not furthered by its citation to irrelevant cases. See Opp. at 13-16, quoting *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 106 (1978) (upholding temporary stays of new franchising pending hearings on the merits

Kolosso's erroneous assertions notwithstanding, the Seventh Circuit's language does not admit room for implicit "assumptions" or *post hoc* supplements. The court clearly and simply held that "little" contractual impairments "don't have to be justified at all" (App. 10a), thus purporting to create a "small impairment" exception to this Court's requirement that all contractual impairments must have an end "which is in fact public." *Triegle*, 297 U.S. at 197.

B. The Conflict In The Lower Courts On The Effect Of Prior Retroactive Legislation.

Kolosso also fails to come to grips with the substance of the circuit conflict on the retroactivity issue, instead trying to focus attention on the existence of different ***prospective*** legislation in the various cases. Opp. 17-23. What Kolosso fails to realize, however, is that the circuit split concerns the effect of the absence, or unconstitutionality, of prior ***retroactive*** legislation.

The Eighth Circuit, in *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383, 385 (8th Cir. 1994), used two criteria to determine that a retroactive franchise provision was not foreseeable: (1) previous state franchise legislation had not been retroactive, and (2) retroactive application of similar franchise statutes elsewhere had "almost uniformly been held unconstitutional." Both criteria were met in this case, but the Seventh Circuit ignored the Eighth Circuit's approach and

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against a due process challenge); *Kuhl Motor Co.* v. *Ford Motor Co.*, 71 N.W.2d 420, 427 (Wis. 1955) (upholding prospective Dealer Act as valid under Due Process and Equal Protection clauses). The Wisconsin Supreme Court has explicitly held that *Kuhl* is inapplicable in Contract Clause cases: "The *Kuhl* case dealt with prospective application of legislation on the freedom to contract, while the instant case involves the retroactive application of legislation on the obligation of existing contracts." *Wipperfurth* v. *U-Haul Co.*, 304 N.W.2d 767, 770 (Wis. 1981).

instead focused solely on past prospective legislation. See Petition 17-18.

Kolosso's assumption that prior ***prospective*** legislation in an area should be the only controlling foreseeability factor merely restates the Seventh Circuit's position. Not once does Kolosso rebut Chrysler's argument (Pet. 15-18) that the court of appeals' analysis cannot be reconciled with the analysis of the Eighth Circuit in *Holiday Inns Franchising* v. *Branstad*, 29 F.3d 383 (8th Cir. 1994).

1. Prior Wisconsin Statutory Provisions Did Not Regulate the Relocation of Dealers.

Kolosso wastes many words (Opp. 17-20) trying to create the erroneous impression that Section 218.01(3x) was foreseeable because the State of Wisconsin had supposedly regulated extensively the relocation of motor vehicle dealers at the time Chrysler and Kolosso bargained for Kolosso's no-relocation clause.

The statutes Kolosso cites, however, hardly demonstrate that Wisconsin had "pervasively" regulated the relocation of motor vehicle franchises. Kolosso fills its brief with citations to irrelevant statutory provisions (not cited by the Seventh Circuit), such as those regulating the rights of family members of deceased dealers (Opp. 3, citing 218.01(3)(a)(26) (1985-86)),[3] but ultimately recognizes that only two provi

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[3] Kolosso provides a laundry list of general provisions from the Dealer Act, including those governing a manufacturer's unfair trade practices (Wis. Stat. § 218.01(5)(a) (1985-86)), coercion of a dealer to enter into an agreement (Wis. Stat. § 218.01(3)(a)(16) (1985-86)), unfair cancellation (Wis. Stat. § 218.01(3)(a)(17) (1985-86)), unconscionable business practices (Wis. Stat. § 218.01(3)(a)(11) (1985-86)), violations of laws relating to the sale, distribution, or financing of motor vehicles (Wis. Stat. § 218.01(3)(a)(14) (1985-86)), unreasonable closure of a dealer point (Wis. Stat. § 218.01(3)(a)(24) (1985-86), and the rights of family

sions merit any discussion. Neither provision, however, comes close to regulating the relocation of protected dealers.

Kolosso first relies on Section 218.01(3)(a)(17) (1985-1986), which prevents a manufacturer from unfairly canceling a motor vehicle franchise. Kolosso assumes, without support or citation, that terminations invariably accompany attempted relocations (Opp. 18), but the patent falsity of that assumption is easily demonstrated by the fact that Chrysler has not terminated Kolosso's franchise in this case. Since termination is not the only remedy available for a breach of contract, such as an unauthorized relocation (see App. 8a, listing injunctive relief and damages), a statutory provision preventing unfair termination or unfair trade practices hardly constitutes a warning that a state would enact a (retroactive) provision eliminating a manufacturer's contractually-bargained-for veto of dealer relocations.

By relying on unfair termination and unfair trade practices statutes,[4] Kolosso essentially argues that once a state has established a general obligation of fair dealing or fair termination, all future regulation of the contract (of any kind) is foreseeable and thus all contracts in the industry or trade are fair game for retroactive impairment. This broad argument clearly cannot be reconciled with this Court's precedent. See,

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members of deceased dealers (Wis. Stat. § 218.01(3)(a)(26) (1985-86). Opp. 2-3. None of these provisions even remotely governs a dealer relocation in breach of contract and Kolosso makes no argument that these provisions made Section 218.01(3x) foreseeable. Equally ludicrous is respondent's apparent suggestion that the Dealer Act's requirement that a dealer's license specify its location (Wis. Stat. § 218.01(2)(e) (1985-86)) made legislation eliminating contractually-bargained-for vetoes of relocation foreseeable. See Opp. 7.

[4] Kolosso cites, but does not discuss, several irrelevant unfair trade practices statutes. See *supra* note 3.

e.g., *Veix* v. *Sixth Ward Building & Loan Ass'n*, 310 U.S. 32, 38 (1940) (upholding "further legislation ***upon the same topic***" because the challenger "purchased into an enterprise already regulated ***in the particular***") (emphasis added).

Kolosso's second attempt to prove foreseeability is based on Section 218.01(3)(a)(26m) (1985-1986), which prohibits a manufacturer from unreasonably refusing "to allow a dealership to share ***its*** facilities with another or who unreasonably refuses to allow a dealership to add another franchise ***at the same location*** as its existing franchise or franchises." (emphasis added). Kolosso tries to transform this provision, which does not even mention relocation, into a bar on a manufacturer's veto of a relocation, so long as the relocation was designed to allow dealerships to share facilities ***at a different location***. Opp. 18-19. Not only has the statute never been applied in this contorted manner, but such an overly generous reading would be barred by the straightforward statutory text. The statute prevents manufacturers only from unreasonably refusing to allow a dealer to share "its" facilities or add a franchise "at the same location." Moving to share another franchise's facilities is simply not protected.

In sharp contrast to the two general provisions on which Kolosso bases its argument, two provisions of the Dealer Act did mention relocation at the time Chrysler and Kolosso were at the bargaining table, but the inapplicability of those sections is even more patent. See Wis. Stat. § 218.01(3)(a)(32), (3)(f)(1). Kolosso cites these provisions (Opp. 3, 7), but does not attempt to make a serious argument based on them.

While Sections 218.01(3)(a)(32) and (3)(f)(1) address "relocation," they do not involve a regulated dealer's "right" to relocate in violation of its contract. Instead, these provisions are designed to protect a third-party dealer's existing location and market from unreasonable attempts by the ***manufacturer*** to establish or bring in a new dealership. See

Wis. Stat. §§ 218.01(3)(a)(32), (3)(f)(1) (1985-86). In further contrast with the regulation at issue in this case, these provisions allow the third-party dealer to protest during a prospective licensing decision, where the State has an interest in its licensing processes, whereas Section 218.01(3x) retroactively impairs a contract between two private parties.

Thus, none of the statutory provisions Kolosso cites or relies on give credence to its argument that Section 218.01(3x) was foreseeable.

2. Kolosso's Assumptions On The Merits Do Not Alter The Circuit Conflict.

The foregoing discussion of the foreseeability of Section 218.01(3x) should not distract from the conflict among the circuits, which Kolosso does not deny nor even address. Instead of addressing the fundamental division in the circuits over the substantiality, or foreseeability, of a contract impairment, respondent erroneously assumes the accuracy of Se[illegible]h Circuit's approach and merely attempts to bolster the facts used to support the decision below.

The clear circuit split cannot be dismissed so easily. As we explained in the Petition (at 15-18), the Eighth Circuit (in contrast to the court below) relied on two criteria to determine the foreseeability of a retroactive contractual impairment: the absence of previous retroactive legislation in the area,[5] and the fact that retroactive application of similar franchise statutes had "almost uniformly been held unconsti-

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[5] Kolosso relies on a distinction without a difference in explaining that the previous prospective legislation at issue in *Holiday Inns* had broader scope than the prior prospective legislation in this case. Opp. 21-22. The court in *Holiday Inns* did not mention or rely on the ***scope*** of the earlier regulations, however. The court instead rested its opinion on the ***nonretroactivity*** of the earlier pertinent statutes. Just as in *Holiday Inns*, all prior related statutes and regulations here were prospective only.

tutional." *Holiday Inns*, 29 F.3d at 385. Both of these criteria were met in this case, see Pet. 17-18, but were ignored by the Seventh Circuit.

Kolosso turns a blind eye to this conflict in the lower courts and, like the Seventh Circuit, merely assumes without discussion that the only proper foreseeability analysis involves examining the quantity of prior legislation — prospective or retroactive, constitutional or unconstitutional. See Opp. 21-23. Kolosso's assumption of the correctness of one side of a circuit conflict hardly serves as an argument against review by this Court to resolve the conflict. As we demonstrated in the Petition, the conflict on this issue is clear and intolerable, creating grave uncertainty in the field of national franchise agreements. Review by this Court is plainly warranted.

It may be inconvenient for the State of Wisconsin to be required to justify impairments in terms of the public necessity. The prior decisions of this Court, and the heretofore settled jurisprudence of the Constitution demand it. So did our Founding Fathers. In their only debate on this clause, Governeur Morris opined that there were a thousand laws relating to contracts and that limiting impairment would go too far. But James Madison was of the view that "* * * inconveniences might arise from such a prohibition, but thought on the whole it would be overbalanced by the utility of it." NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, reported by James Madison, August 28, 1787, at 440 (Farrand ed. 1966). Madison's view prevailed then, and should prevail now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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